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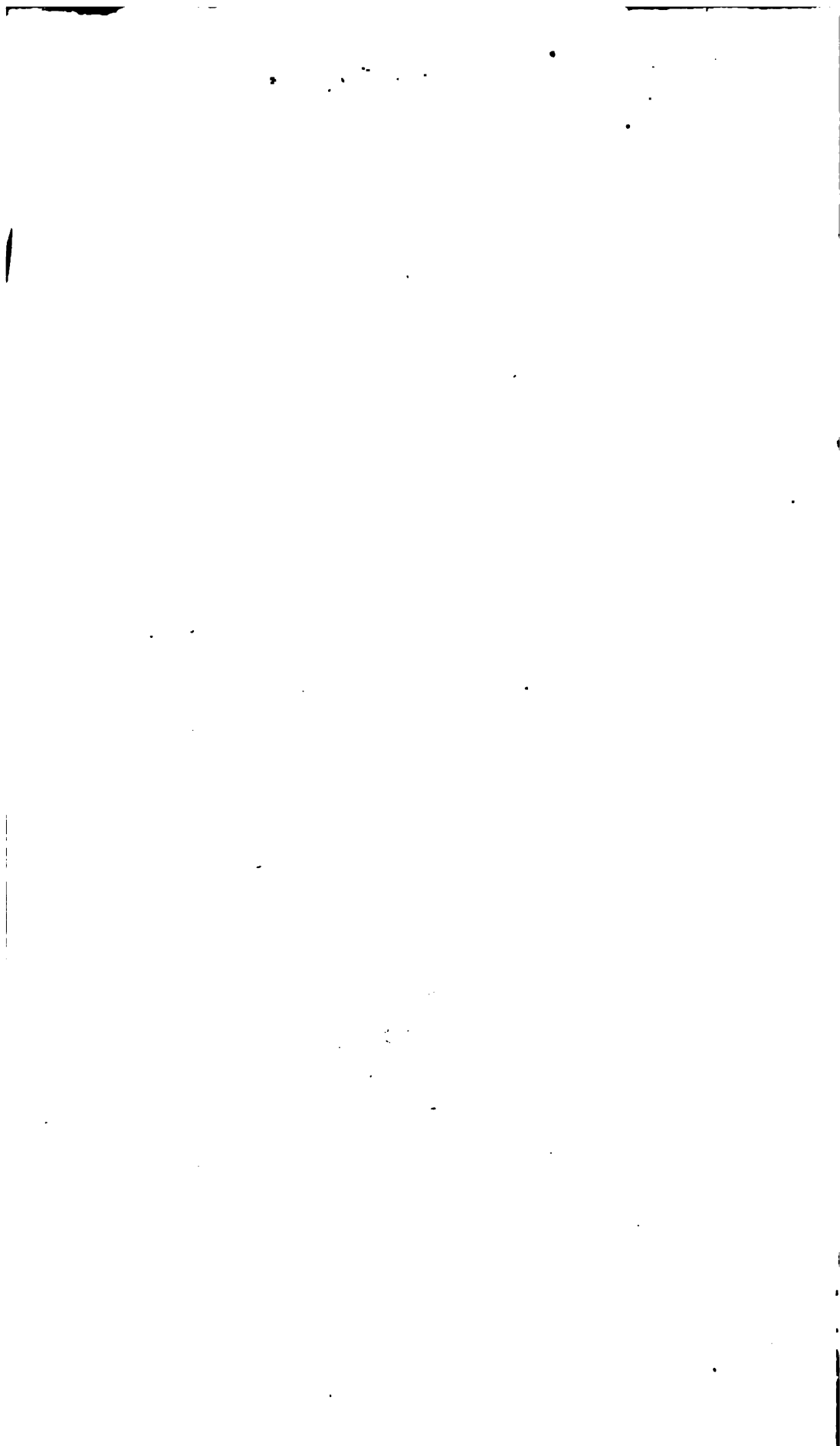
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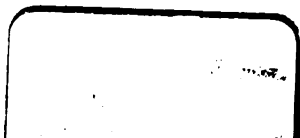
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# IRISH COMMON LAW REPORTS.

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## REPORTS OF CASES

ARGUED AND DETERMINED IN THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS,

EXCHEQUER,

EXCHEQUER CHAMBER, AND COURT OF CRIMINAL APPEAL

DURING THE YEARS 1862, 1863 AND 1864.

*Queen's Bench;*

By WILLIAM BARLOW, Esq. AND JOHN HEZLET, Esq.

*Common Pleas;*

By SAMUEL V. PEET, Esq. AND WM. B. KAYE, Esq.

*Exchequer;*

By CHARLES H. FOOT, Esq.

*Exchequer Chamber;*

By WILLIAM BARLOW, Esq. SAMUEL V. PEET, Esq.  
AND CHARLES H. FOOT, Esq.

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# JUDGES AND LAW OFFICERS,

*During the period of these Reports.*

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*The Lord Chief Justice.*—The Right Hon. THOMAS LEFROY.  
The Hon. JAMES O'BRIEN.  
The Hon. EDMUND HAYES.  
The Right Hon. JOHN D. FITZGERALD.

## COURT OF COMMON PLEAS.

*Lord Chief Justice.*—The Right Hon. JAMES HENRY MONAHAN.  
The Right Hon. NICHOLAS BALL.  
The Right Hon. WILLIAM KEOGH.  
The Hon. JONATHAN CHRISTIAN.

## COURT OF EXCHEQUER.

*Lord Chief Baron.*—The Right Hon. DAVID RICHARD PIGOT.  
The Hon. FRANCIS A. FITZGERALD.  
The Hon. HENRY GEORGE HUGHES.  
The Hon. RICKARD DEASY.

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# COMMON LAW REPORTS,

OF CASES ARGUED AND DETERMINED IN

THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS, EXCHEQUER,

Exchequer Chamber,

AND

COURT OF CRIMINAL APPEAL.

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TISDALL *v.* PARNELL.

(*Exchequer.*)

H. T. 1863.

*Exchequer.*

Jan. 19, 20.  
Feb. 12.

THIS was an action brought by Elizabeth Tisdall widow, against the Hon. H. W. Parnell, for trespass *quare clausum fregit*. There were also counts for trover, and conversion of the turf upon a certain portion of bog in the county of Westmeath. The first and second defences denied the plaintiff's possession, and the entry alleged. The third and fourth defences alleged that the defendant, under a patent of the 19 *Car.* 2, was tenant in common with the plaintiff of the bog in question.

A piece of bog, X, was surrounded by four townlands, A, B, C, and D. X was described in the reference to the Down Survey as "bog belonging to the adjacent towns." A, "together with all bogs,

&c. &c., thereunto belonging," had been granted to the ancestors of the plaintiff by letters patent of the 33 *Car.* 2; and B, "together with all bogs, &c. &c." had been granted to the ancestors of the defendant, by letters patent of the 19 *Car.* 2.

To an action for trespass upon X, brought by the owner of A, a tenancy in common was pleaded by the defendant the owner of B. At the trial, the meaning of the reference was left to the jury, who found for the defendant. Upon motion for a new trial—*Held* (the LORD CHIEF BARON *dissentiente*) that the words "belonging to the adjacent towns" did not, at the date of the letters patent, create a tenancy in common in X, but meant that undefined portions of X formed part of the adjacent towns.

*Per* the LORD CHIEF BARON—The meaning of the words "belonging to the adjacent towns" was a question for the jury, who had properly found those words to mean that X was held in common by the owners of the adjacent townlands.

To establish a tenancy in common by use and enjoyment, acts of ownership by all the alleged tenants in common, in various parts of the lands indifferently, must be proved.

A jury may, without consent, be discharged from finding upon an issue which their findings on other issues render immaterial.

The inadmissibility of the Ordnance Survey as evidence upon questions of title illustrated.



H. T. 1863.  
*Eschequer.*  
 TISDALL  
 v.  
 FARNELL.

The case was tried at Mullingar, at the Summer Assizes of 1862, before the Lord Chief Justice. It appeared that the plaintiff was the owner of the lands of Killaghee, and that the defendant was the owner of the lands of Glascarn. The place in which the trespasses occurred was a portion of bog adjoining both these lands. The plaintiff gave in evidence the following documents (amongst others):—a patent of the 18th of April 1681, 33 *Car.* 2, which granted to Richard Fitzgerald the town and lands of Killaghee in fee, containing 103a. 1r. 24p., together with all bogs, &c., &c., thereunto belonging, situated in the barony of Rathconrath. A tracing of the Down Survey, and a copy of the reference to the map, wherein the town of “Killaghugh,” containing 103a. 1r. 24p. of profitable land, was described as belonging to Thomas Fitzgerald; and 121a. 1r. 8p. of R bog was described as “bog belonging to the adjacent towns.”—[For a transcript of the references, *vide* the judgment of the LORD CHIEF BARON, p. 16.]—A lease of the 5th of July 1746, whereby A. Malone demised to James Fitzgerald, for lives renewable for ever, the lands of Killaghee, containing 103a. 1r. 24p., and 40 acres of unprofitable land. Several aged witnesses stated that, as far back as their recollection extended, the turf-bog adjoining the lands of Killaghee, up to the lands of the defendant, was set by, and rent therefor paid to, the bailiffs of the plaintiff, and those through whom she claimed, until the year 1861.

For the defendant the following documentary evidence (*inter alia*) was given:—patent of the 19th of June 1666, 19 *Car.* 2, granting to Mary Woodward, Letitia Durham and Charles Woodward, Glascarn, in the barony of Moycashel, containing 118a. 2r. 32p., profitable land, one-third each, for life; remainder of the entire to Charles Woodward and his heirs, for ever, together with all bogs, loughs, &c. &c., common of pasture and turbary to the premises, or any of them, belonging or appertaining, at the yearly rent of £13. 7s. 11d. Also three tracings from the Down Survey, and a map embodying the extracts.

The titles of the plaintiff and defendant to the respective townlands were admitted.

On behalf of the defendant, it was stated by a surveyor that,

in 1836, no part of the bog was then appropriated, except parts in the exclusive possession of the tenants of the plaintiff, and of three other adjoining proprietors, inclosed next their good land; that there was then a considerable part of the bog unappropriated, of which a large portion fronting Glascarn was, at the time of the trial, unappropriated.

H. T. 1863.

*Exchequer.*

TISDALL

v.

FARNELL.

The plaintiff's Counsel objected that there was no evidence to go to the jury of the defendant's title as tenant in common of the bog; and further, that there was no evidence of the enjoyment by the defendant or his ancestors of the bog, as tenants in common. His Lordship overruled the objections, and in his charge called the attention of the jury to the maps given in evidence by both parties, as showing the grant of the whole bog referred to by the letter B—[*vide* the judgment of the LORD CHIEF BARON, p. 16]—for the use of the adjacent towns, and to the appropriation of portions of that bog by the parties possessing the adjacent land. His Lordship then told the jury that the only question was, whether the defendant was tenant in common with the plaintiff to the unappropriated portion of the bog upon which the alleged trespass had been committed; and that, if a tenancy in common had been originally created over the whole bog, it would continue until put an end to, either by a partition operating upon the whole, or by an appropriation of particular parts by the several tenants in common, with the concurrence or sufferance of the others; but that such appropriation would only determine the tenancy in common as to both parts so appropriated; and as to the rest of the bog not so appropriated, the tenancy in common would continue. He further told the jury that there was clear evidence of partial appropriation (but not more) by the owners of the adjacent lands, or their tenants, which appeared to him to be in accordance with the note upon the Down Survey describing it as "bog belonging to the adjacent towns," but that there was evidence that there remained of this bog, in 1836, above 121 acres unappropriated; and that in his opinion if a tenancy in common was originally created, it would still subsist as to so much as remained unappropriated.

H. T. 1863. The jury found for the defendant, with his Lordship's approval.  
*Eschequer.*  
**TISDALL**  
 v.  
**FARNELL.** A conditional order for a new trial having been obtained by *G. Battersby*, upon the grounds of misdirection, and of the verdict being against the weight of evidence—

*Hans Hamilton* and *C. Palles* now showed cause, and cited *Knox v. The Earl of Mayo* (a); *Jack v. M'Intyre* (b); *Wilkinson v. Haygarth* (c).

*G. Battersby* and *C. Ferguson*, contra.

As to the value of the Judge's approval or disapproval of the verdict: *Allaway v. Bennett* (d). As to rights of common: *Selwyn's Nisi Prius*, p. 495. The question as to the plaintiff's expulsion should have been left to the jury: *Murray and others v. Hall* (e); *Edge v. Wandesforde* (f).

*Palles*, in reply, cited *Boyle v. Olpherts* (g); *M'Mahon v. Lennard* (h); *Wheelton v. Hardisty* (i); *Trew v. The Railway Passengers Assurance Company* (k); *Empson v. Fairfax* (l).

FITZGERALD, B.

Feb. 12. A piece of land, computed to contain 121 acres, is situate between four townlands. It has four boundaries, each of which forms a boundary of one of the four townlands respectively.

Of these four townlands, admittedly one is the property of the plaintiff in this cause; one of the defendant; and the other two belong each to another proprietor.

A principal question in the action is, whether the plaintiff and defendant are, or are not, tenants in common of a portion of the piece of land containing 121 acres.

(a) 7 Ir. Chan. Rep. 563; on appeal, 9 Ir. Chan. Rep. 192.

(b) 12 Cl. & F. 151; 8 C., 3 Ir. Law Rep. 140, and 5 Ir. Law Rep. 552.

(c) 12 Q. B. 837.

(d) 6 Jur., N. S., 347.

(e) 7 C. B. 441.

(f) 9 Ir. Law Rep. 161.

(g) 4 Ir. Eq. Rep. 241.

(h) 6 H. of Lds. Cas. 970.

(i) 8 Ell. & Bl. 232.

(k) 6 Jur., N. S., 759.

(l) 8 Ad. & Ell. 296.

It is now sought to set aside a verdict obtained by the defendant upon that issue, on the ground that no evidence was given at the trial of the existence of such tenancy in common.

H. T. 1863.  
*Eschequer.*  
TISDALL  
v.  
FARNELL.

The piece of land containing 121 acres is described in the reference to the Down Survey as "bog belonging to the adjacent towns;" and tracings from the Down Survey, showing its position, and one of which contains this description, were given in evidence at the trial.

The defendant's title to his townland is under letters patent, 19 *Car.* 2, founded on the Acts of Settlement and Explanation, and which grant to the party from whom he derives the townland to which he is unquestionably entitled, and also, *inter alia*, all bogs to the same belonging or in anywise appertaining.

The contention of the defendant has been, that, by these letters patent, there passed to the grantor an undivided share (the quantity of which he is not prepared to state) in the soil of the piece of land in question, to be held in common with those from whom the plaintiff and the two other proprietors of the other three townlands derive.

Assuming, that, by a grant of bog, belonging to or in anywise appertaining to "the defendant's townland," or that, in any other way, an estate in the soil of all or some part of the 121 acres *might* pass by the patent, it seems to me that the question whether "an undivided share" did or did not thereby pass, can only be determined by ascertaining what interest in the 121 acres was in the Crown, or was disposable by the Crown at the date of the patent.

Nothing could pass which was not in the Crown; and I think it may be assumed that all that was in the Crown, or disposable by the Crown, whether as bog—parcel of the defendant's townland, though in excess of the acreage of profitable land mentioned in the patent,—or as corresponding to the description of "bog to the land belonging or in anywise appertaining," would pass.

The patent itself affords no means of ascertaining what the interest of the Crown, at its date, was; and, if ascertainable, this must be ascertained by evidence outside the grant.

The first piece of evidence relied on by the defendant for this

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The meaning of this description he asserts to be, first, that the piece of land belonged to *all* the four adjacent townlands; from which it follows that, so far as it belonged to *his* townland, it passed by his patent: and, secondly, that it did belong to the four townlands as belonging to the proprietors at the date of the Down Survey, or to the antecedent proprietors of those townlands, as tenants in common.

Assuming the meaning to be, that the bog belonged to all the four townlands (as to which, however, there is this difficulty, that the portion of the Down Survey to which the description refers does not exhibit the defendant's townland at all), I must confess myself unable to understand how the meaning of its belonging to the then or former proprietors of the four townlands, as tenants in common, is to be extracted from the description.

To mention no other difficulty, the giving this meaning supposes that the townlands, at the time of the survey or antecedently, belonged to distinct proprietors; of which I can see no evidence whatsoever.

The Down Survey, so far as it has been produced, shows that the plaintiff's townland belonged to one Thomas Fitzgerald; but whether he was or was not the proprietor of the other townlands no way appears, nor is it shown who was or were the proprietors. Possibly the inference from the plaintiff's letters patent, 33 *Car.* 2, also founded on the Acts of Settlement and Explanation, might be that one Edward Fitzgerald, whose son and heir this Thomas Fitzgerald was, had, with him, been owner of the whole barony of Moycullen, and that both had, as such, "truly" forfeited.

Again, supposing all the townlands to have been "truly" forfeited, though held by distinct proprietors, and held as tenants in common, then all the townlands would, with the bog, have vested in the Crown, not to be restored to the old proprietors, but to be granted on "the new titles;" and there would be an end of all tenancy in common.

The Down Survey was made in the time of the Commonwealth,

for the purpose of distributing the forfeited lands to adventurers and soldiers, pursuant to an English Act of *Charles 1*, passed on the eve of the Civil War, and to certain subsequent ordinances of Parliament, in quantities proportioned to advances of money made, or arrears of pay due, but having no regard to the quantities held by the forfeiting proprietors; though it is true that, with the specified quantities, bog or unprofitable land to any amount, *forming part* of the denominations of land granted, might be given.

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But supposing (and it seems going as far in the way of supposition as is possible) that the four townlands did, at the date of the Down Survey or antecedently, belong to distinct proprietors, and that there was *some* old title in the proprietors of some of them, which must, or may be, considered as regulating, to some extent, the new titles granted by the Crown, I yet cannot see how, or in what way, "belonging to the lands" is made to mean belonging to the owners of the lands as tenants in common.

The more obvious meaning of the reference in the Down Survey would appear to me to be, that this bog or waste belonged to, in the sense of forming part of, the adjacent townlands, or some of them, but so that the boundaries of the waste belonging to each denomination did not appear: a state of things not unknown in England, as to the wastes of adjacent manors; but so common in Ireland, that an Act of Parliament (5 G. 2, c. 9) was passed for the purpose of ascertaining, by a summary proceeding in equity, the ancient mears and bounds of bog and waste land, so situate, where it was possible; and, where not possible, of laying down, on equitable principles, new mears and bounds of the wastes, between the proprietors of the adjacent lands.

However it is further urged, that the description is at least capable of the meaning suggested, and then evidence of subsequent user of the bog may be resorted to, for the purpose of showing that it was held in common; and so fixing on the description this possible meaning, and then applying that meaning to the construction of the defendant's grant.

Assuming this to be so, I apprehend the proper evidence to show, from user and enjoyment, a tenancy in common in land, is to prove

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that the alleged tenants in common have exercised acts of ownership in various parts of the land indifferently; that there had been a mixed enjoyment.

The question is not whether exclusive acts, done by any one, might not be explained, supposing a tenancy in common to exist; but whether there is any evidence of acts done by all the claimants from which a tenancy in common can be inferred.

Now, unquestionably, as to a very large portion of the 121 acres referred to in the Down Survey, it appears that it has been long since in distinct parcels, appropriated and annexed to their respective townlands in severalty, by the proprietors of three of the adjacent denominations, including the plaintiff and excluding the defendant; and as to this part, there is not even a shadow of evidence that there ever was a mixed enjoyment.

There is some evidence that in the year 1836, the residue of the 121 acres, including what is now in dispute, and particularly the *locus in quo*, was not so clearly annexed to any of the adjacent townlands; but there is a body of evidence as to the part so in dispute, that it has been repeatedly let by the plaintiff and those from whom he derives; that rents have been received out of it; and particularly from persons being at the time tenants of portions of the defendant's townland. Again, a series of conveyances, by those from whom the plaintiff derives, from the year 1746, has been proved, granting his admitted townland, together with a specified number of acres of bog, about-one-third, I think, of the whole 121 acres in number, and sufficient to include what has not been approved or annexed by the other proprietors, and conveying them as if held in severalty.

As against this, there was offered by the defendant a somewhat doubtful piece of evidence, as to the occupation of a very small portion of the bog; but an occupation in severalty, and exclusive of it all; and therefore having no tendency to prove a tenancy in common of that.

Some evidence there also was of one, or perhaps two, interruptions by the defendant of the exercise by the plaintiff of particular acts of ownership in the unappropriated bog; but no evidence at all

that these interruptions were made under, or accompanying, a claim of tenancy in common. H. T. 1863.

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This seems to me the whole substance of the defendant's case, as it appeared at the trial; and I am of opinion that it showed no evidence that the piece of land containing 121 acres, or any part of it, was ever enjoyed by tenants in common; and, consequently, I think that the rule for a new trial ought to be made absolute.

HUGHES and DEASY, BB., concurred.

DEASY, B.

The case of *Knox v. Mayo* (a) is not, *per se*, an authority for the admissibility in evidence of the Down Survey and the Books of Distribution; for in that case there was abundant evidence of acts of ownership by all the parties, as tenants in common. Here there is evidence of a series of acts of ownership, such as letting, &c. &c., exercised by the plaintiff alone, not by the defendant.

FIGOT, C. B.\*

I am of opinion that the verdict in this case ought not to be set aside on the ground of misdirection. We can only deal with the objections to the charge of the learned Judge, as they appear in his report. He there states, that there were but two objections. The first was, that there was no evidence to go to the jury that the defendant was tenant in common of the bog. The second was, that there was no evidence of any possession or enjoyment by the defendant, or those under whom he claimed, as tenants in common or otherwise, of the *locus in quo*; and that therefore he did not prove his justification. I collect, that on these grounds the learned Judge was called upon to direct a verdict for the plaintiff, as to the issue involving the question of tenancy in common.

As to the first objection; my Lord Chief Justice reports, that he left to the jury the question whether the defendant was tenant in common with the plaintiff. I understand that to mean, whether the defendant was so tenant in common with the plaintiff and the

(a) *Ubi supra.*

\* DEASY, B., read the judgment of the LORD CHIEF BARON, who was sitting at Nisi Prius.



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I think there was evidence of a tenancy in common furnished by the Down Survey, and the references appearing upon it, showing the condition of the bog in ancient times; by the proof of its condition in recent times; and by the proof of the manner in which the lands, including the bog, had been dealt with. Upon the evidence, in my opinion, a question as to the things granted by the patents which were given in proof arose, not for the Court, but for the jury, namely, whether "the bog belonging to" the lands granted by each of the patents was, or was not, an undivided share in the adjacent bog.

It was not disputed that not only the maps, but also the references on the Down Survey, were proper evidence to be considered in determining what was the thing granted by the patents, and how, when the Down Survey was made, it was or had been enjoyed. For similar purposes the references of the Down Survey appear to have been admitted in *Lessee of Rolleston v. O'Brien* (a), in conformity with a former decision of Lord Chief Baron Gilbert.

Before the Down Survey was made, considerable tracts of the forfeited lands had been allotted to adventurers and soldiers, without any sanction from the Parliament of Ireland. Some of the purposes of the Act of Settlement (14 & 15 Car. 2, c. 2, 1662), and of the Act of Explanation (17 & 18 Car. 2, c. 2, 1665) were to confirm, with certain modifications, what had been so done in the making of allotments; to retrench redundancies and to supply deficiencies in those allotments; to settle various disputes relating to them; to provide for the making of further allotments to unsatisfied adventurers and soldiers; and to provide requital for a class of commissioned officers who had served previously to the 8th of June 1659. In a great number of cases, the allotments of land of which parties were in actual possession and enjoyment on the 7th of May 1659 were confirmed to them, subject to the modifications provided by the Act of Explanation. A right was conferred by those Acts of Parliament upon the allottees who

(a) 2 How. Exch., 157.

should obtain certificates from the commissioners acting under the statutes, to obtain also patents from the Crown in conformity with those certificates. The forfeited lands were declared to be seized into the King's hands without office found; but they were declared to be so seized to the uses and purposes of the Acts. The commissioners not merely were at liberty, but were bound, to refer to the Down Survey, wherever it applied, in arranging the allotments. This appears from the Act of Settlement, section 2 of the Instructions of the King incorporated in that statute, and from the Act of Settlement, sections 5 and 7. Under the 2nd section of the Royal Instructions, the commissioners were "to cast up the whole debt and demand of the adventurers, as well those that were satisfied as those that were deficient, as also the forfeited lands assigned to and for the said adventurers, according to the survey commonly called 'Doctor Petty's Down Survey.'" They were to compare together the said demands and lands; and "what the lands fell short of satisfying the said adventurers, according to the rates, measures and proportions of which all or any of the adventurers were possessed the 7th of May 1659," was to be supplied to them out of the forfeited lands in specified counties. The 5th section of the Act of Explanation provided for two classes of persons; first, the adventurers and soldiers (and those representing their interest) who, on the 7th of May 1659, "were seized or possessed of any lands" for or towards satisfaction of their adventures or arrears; and secondly, for the class called "deficient adventurers, whether they were deficient in whole or in part." Under that section, both those classes were "to have, hold and enjoy, and be settled and confirmed in, so much of the forfeited lands, as were by that Act vested in his Majesty, as would amount to full two-thirds of what they, or those under whom they claimed, had, or in cases of deficiency ought to have had, on the 7th of May 1659." And in effecting that object, the 5th section directed, that the commissioners for execution of the Act should inquire what quantity of land the adventurer or soldier, or those representing him, "had or were seized or possessed of on the 7th of May 1659," "or of right ought to have had and been seized and

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H. T. 1863. *possessed of* upon that day, in case he were a "deficient adventurer." And the commissioners were further directed to "cause to be *set out and allotted* unto every such adventurer or soldier," or the persons representing his interest, "*so much forfeited lands as in quantity of Irish profitable acres, to be computed according to the Down Survey or Down admeasurements, and not otherwise*, where the Down Survey hath been taken, and, where the Down Survey hath not been taken, by the survey taken in the Earl of Strafford's time, or by some other survey to be taken according to Irish measure, *wherein the unprofitable land is to be cast in together with the profitable (according to the method of the said Down Survey)*, will amount unto two-third parts (the whole into three parts to be divided)" of what the persons to whom such allotment should have been made, or those under whom they "did hold and enjoy, or in case of deficiency, of right ought to have held and enjoyed, upon the 7th of May 1659." And the 5th section then proceeds to provide, that the two-third parts so to be allotted "shall be held and enjoyed by the persons to whom such allotments shall have been made, according to the tenor of their several and respective letters patent hereinafter directed to be granted," in full satisfaction of their claims. By the 7th section provision is made that, to the end that there might be as little change as could exist with the ends and aims of the Act, wherever the adventurer or soldier, or his representatives, should be in possession of more than his two-third share, it should be lawful for him to continue in possession of "so much as the commissioners shall adjudge his or their two full third parts to amount unto, and cut off the surplus at his or their election, in such manner as that the overplus relinquished or surrendered by him or them may be contiguous, and as near as may be within the same denominations: *in which retrenchment the unprofitable lands as well as profitable are to be reckoned and parted with together, in like manner and proportion as the same were set out together, according to the said surveys.*"

The 13th section provides for the granting of certificates by the commissioners to the allottees, and for the granting of patents in pursuance of those certificates.

If the Crown had become seised of the forfeited lands *pleno jure*, without any rights having been acquired to specific lands by those to whom the patents were to be made, the question now before us would involve some difficulties from which I think it is disembarassed by the Acts of Settlement and Explanation. In that case the Crown being seised of the entire lands and bog, and having granted them to different persons, there would be great difficulty in applying the terms of the patents to the lands and premises granted, by any reference to former rights or former enjoyment, which must have been wholly extinguished when those lands and premises became the absolute property of the Crown. But, according to the plan of settlement applied by these statutes to the forfeited lands, possession and enjoyment, on the 7th of May 1659, of lands previously allotted (subject to any retrenchment to be made by the commissioners), and the allotment of lands subsequently made or sanctioned by the commissioners, conferred an inchoate title to such lands, according to such possession and enjoyment, or to such allotment; and that inchoate title, authenticated and evidenced by the certificate of the Commissioners, conferred an absolute right to a grant, by letters patent from the Crown, assuring to the allotted just so much (and no more) as was comprised in his inchoate title. If, therefore, the four denominations (if that was their number) of land adjacent to this bog were, on the 7th of May 1659, in possession of persons holding under former allotments, those denominations in severalty, and holding the bog in common in undivided shares; and if each had obtained his certificate declaring his title to his separate townland "with the bog thereunto belonging;" and if each had obtained a patent containing a grant in similar words (that is, each patent granting the townland with "the bog thereunto belonging") then, by each patent there would plainly be granted only an undivided share of the bog, since that was all of the bog that would have then "belonged to" the townland. So, if the allottee claimed under an allotment made by the commissioners under the statutes, without a possession enjoyed on the 7th of May 1659, a similar title, with similar results, would have

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been acquired by the allotment of the townlands in severalty, and of the bog in common. And if, when the Down Survey was made, the bog was actually enjoyed as undivided property by several persons owning in severalty the adjacent townlands, and if the commissioners acted upon that enjoyment in making the allotments of the several townlands, the result would have been the same. Even if the several townlands and the bog had all been formerly in the possession of a single owner, and if the commissioners had allotted, *in fact*, the townlands to separate adventurers, and the bog to be held by them in common, the same result would have happened. For the certificate, though it contains the adjudication of the right of the allottee, is not the allotment. The "selling out" and allotting of the lands necessarily preceded the certificate, which only testified to the allotment, and established, by so testifying, and by adjudging the party entitled to the lands, the validity of the allottee's claim, and his title to hold what had been allotted to him, and to have that title clothed with a patent from the Crown.

In the case before us, two patents only were produced ; one is the patent of the 19 *Car.* 2 (1666), granting Glascarn to the Woodwards, under whom the defendant derives ; the other is the patent of the 33 *Car.* 2 (1681), to Richard Fitzgerald (under whom the plaintiff derives), of the lands of Killahee, called in the Down Survey Killaghugh. Each patent grants the bog "belonging to" the townland which it specifically grants by name ; words which would plainly be adapted to the passing either of an undivided share or of an estate in severalty, according as the one or the other had been allotted to the patentee or to the person under whom he derived. It is unnecessary to refer to the particular grounds on which the grantees were entitled to the lands further than this. The patent to the Woodwards (1666) shows that the lands granted by it had been "sequestered, disposed, distributed, set out, and set apart," by reason of, or on account of, the rebellion of 1641 ; and that the Woodwards were, by the certificate of the commissioners, adjudged and decreed to be, under the Acts of Settlement and Explanation, lawfully entitled to the lands and premises so after-

wards granted by this patent, comprising the lands of Glascarn, and all bogs belonging thereto. The patent to Richard Fitzgerald (1681) is founded upon certain provisions of the Act of Explanation, relating to commissioned officers who served before the 5th of June 1659; and it shows that the lands had been in mortgage; that Edward Fitzgerald, and Thomas Fitzgerald his son and heir, were entitled to the equity of redemption of the mortgaged lands when they were forfeited by the rebellion of 1641; that Edward and Thomas Fitzgerald were Irish Papists, who were never declared innocent; that the right of redemption was forfeited, and vested in the Crown, to the use of the commissioned officers who had served before the 5th of June 1659; that Richard Fitzgerald, being in actual possession of the lands, and having made discovery of the title, was entitled to the lands, subject to certain payments which he had offered to make to the use of those commissioned officers; and that Richard Fitzgerald was accordingly, by the certificate of the commissioners, adjudged rightfully entitled to the lands and premises granted by the patent. It is not improbable that the Thomas Fitzgerald mentioned in the patent was the same Thomas Fitzgerald named in the reference in the Down Survey; and that, although he seems to have been there designated by a mark indicating that he was an "innocent Papist," yet it was afterwards found that he had never been declared such by a proper decree of innocency. In different ways therefore, and at different times, the lands of Glascarn and the bog thereunto belonging, and the lands of Killahoe and the bog thereunto belonging, were the subject of allotment; and were in the possession of the patentees, or of those under whom they derived.

The question "what *was* the bog which passed by each patent" must, in my judgment, be determined now, as it must, if it arose in 1666 or 1667, have been determined then, by ascertaining what bog had been allotted by the commissioners. That question could then have been determined by living witnesses, deposing to the possession and enjoyment acquired by each allottee under his allotment. At the present time, and in the absence of all direct evidence of that enjoyment, the question must be determined partly by the

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The ancient documentary evidence, indicating possession or enjoyment, consists solely of the patents (which prove nothing as to how the bog was enjoyed), and partly of the Down Survey. The Down Survey shows that there was a tract of bog surrounded by several denominations of profitable land, which are shown upon the maps, with the respective acreage of each of those denominations: one of these is Glascarne, bounding the bog on the north-east; the other is Killaghugh (called in modern times Killaghee), bounding the bog on the north-west: each of these extends about half-way on the northern side of the bog, of which the length from east to west is considerably greater than its breadth from north to south. About midway on the northern boundary, Glascarn and Killaghee meet, and are conterminous, the boundary between them taking a north-westerly direction. Among the references to the map are two lines, written in the spaces occupied by the columns:—

Number in Plot.	Proprietors' Names.	Denominations of Lands.	Number of Acres by admeasurement.	Lands Profitable.	Lands Unprofitable.
20	Thomas Fitzgerald, I.P.	Killaghugh	A B P 103 1 24	Same 103 1 24	
B	Bog belonging to the adjacent towns	... ..	... ..	... ..	R. Bog 121 1 28

On the maps the figure 20 is marked on the denomination of Killaghugh; and the letters, words and figures "(B)," "R Bog, "Acr., 121:1:68," are marked in the space, which is described by lines bounding the several adjacent denominations. It will be observed that while, in the column headed "lands profitable, 103:1:24," the acreage is placed opposite the denomination of Killaghugh, no acreage is placed opposite that denomination in the column headed "unprofitable land;" the reference thus indicating apparently that there was no unprofitable land bearing that name.

The acreage of the "unprofitable land" is all placed under that heading, which has no designation annexed to it save the words "bog belonging to the adjacent towns;" indicating apparently that no part of the bog bore the name of any townland. There are no lines upon the portion of the map which comprises the bog, showing any internal boundaries; nor are there any marks or words whatever except those which I have stated. The bog therefore appears upon the map and these references to have been, when the survey was made, an open bog, uninclosed save by the adjacent profitable lands, which have distinct boundaries and distinct denominations; showing by the map (as the first of the two lines above mentioned indicate), that they were distinct "towns," or townlands.

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The inference afforded by the Down Survey appears to me to be all but conclusive, to this extent that, up to the time when the map was made, the bog was an open undivided tract, no part of which had been ever inclosed or appropriated in severalty.

The words of the reference, "bog belonging to the adjacent towns," *may* mean either of two things—either that the bog, in undefined quantities, belonged in severalty to the owners of the adjoining profitable land; so that, to a certain distance undefined from the boundary of the profitable land in upon the bog, there was an estate in severalty in that undefined portion of the bog vested in the owner of the adjacent denomination: or on the other hand, the words may mean that the bog was held in common by the owners of the adjoining denominations. What these words mean (the document not being an instrument to be construed by the Court, being nothing more than a description of the lands in an ancient instrument, not being a conveyance or a contract) was a question, in my judgment, for the jury, to be determined by such evidence of the surrounding circumstances as they had before them. And it appears to me that the Down Survey itself furnished not only reasons, but strong reasons, for rejecting the former, and adopting the latter, as the import and effects (as evidence) of the map and references. The very nature of an open bog indicated the kind of enjoyment of which it was most suscep-



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tible, and which was most suitable to the position and requirements of the adjoining owners. It was, from its very nature, useful, exclusively or chiefly (while uninclosed, as it may be presumed to have been for all time past) for turbary, or for pasture. For the one or the other to attempt a several enjoyment of undefined parts of a tract of bog so small as that which any one of the owners of the adjoining townlands (if several persons owned them) could have enjoyed as his share of the 121 acres of bog, would have led to constant disputes, and to the expense of several and distinct herds to attend to the cattle, and caretakers to attend to the turbary of the bog. The very nature and position of the bog therefore appears to indicate the strong probability that, for all antecedent time, or since the townlands were inclosed, it had been enjoyed as undivided property: that is, by a tenancy in common, if there were several owners of the several townlands. If such was the enjoyment prior to the allotment of the lands as forfeited lands, it is highly probable that, for similar reasons of convenience, and following former usage, the commissioners and allottees would have adopted that former mode of enjoyment; and if there were not several and distinct owners of the townlands, and if all had previously belonged to one owner, the inference appears to me to be at least equally strong in favor of a common enjoyment having been adopted in the allotment of the profitable and unprofitable land; for if all had been enjoyed by one forfeiting owner, then, where the townlands were allotted in severalty by name, and where the bog (bearing no name, as to the whole or any part of it, of any townland) was left without any appropriation of any specific part of it to any of the adjoining townlands, the reasonable presumption and inference appear to me to be, that the commissioners and allottees treated this bog as a tract to be enjoyed in common among those who were to enjoy in severalty the adjacent townlands; otherwise, there seems no reason why the bog, on the allotments being made to several persons, of several parts of the former property of a single owner, should not have been divided, and why the parts of it adjoining the respective townlands allotted should not have been thus in severalty, and by distinct boundaries, "cast in" with the

profitable land. If enjoyment in severalty were intended, the obvious course would have been to divide and define what was to be so enjoyed, and so prevent disputes between the owners and those who should succeed them. If this had been done, the subsequent enjoyment would have been in all probability conformable with it, and some traces of it would have appeared upon the bog in more recent times.

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The terms of the reference, "bog belonging to the adjacent towns," appear to me, in their primary and more obvious meaning, to import that the bog was enjoyed and held in common. The term "bog" primarily indicates the whole bog (which was undivided), and not a part or parts of it. If the whole bog belonged to all the adjacent "towns," or their owners, then the owners, if they were several persons, must have owned the bog as tenants in common, unless they were coparceners or joint tenants; and if they were, which is not probable, the effect of the Acts of Settlement and Explanation, and of the vesting in, and granting by, the Crown, made it impossible that any other joint interests could legally have been acquired than those of tenancies in common. It is needless to speculate upon the kind of an estate or interest which became vested in the Crown upon the forfeiture (if it took place) of *all* the denominations or townlands. The Acts of Settlement and Explanation vested the forfeited lands in the Crown, for the express and specific purpose of being granted to persons becoming entitled as of right to patents under the certificates of the commissioners—[Act of Explanation, Instructions, sec. 13]. And in allocating the lands, with a view to those certificates, the commissioners were, as I have said, bound to have regard to the Down Survey, where it applied [sections 5 and 7]. If the Down Survey be rightly interpreted as showing that the bog was held with the adjacent townlands, undivided and in common, I think the inference is almost irresistible that, in whatever way it was dealt with by the commissioners, in allotting or confirming the lands and bog to the parties to whom they adjudged them, and to whom they gave their certificates, in that way the lands and bog passed to those parties by the patents from the Crown.

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The evidence of the condition and enjoyment of the bog in more recent times is far from satisfactory; but enough appears, to show that there was evidence of a large portion of the bog, about 80 acres, being unclosed in 1836. It does not distinctly appear whether any portion of what was so inclosed has been since appropriated. The portion on which the lockspitting took place, which was the trespass complained of, remains unclosed to the present time. Vaughan says that there are now (or were in 1836) about 80 acres not appropriated. Some criticism was applied at the Bar to the terms "appropriated" and "unappropriated." We cannot always prevail on witnesses to use perfectly clear language. I have no difficulty in understanding, that where the witness speaks of bog unappropriated by the owners of the adjacent townlands, he conveys this—that those owners had not done acts for the purpose of *making* any of that portion of the bog *their own*, by inclosing, fencing, or other similar acts asserting exclusive ownership. There was therefore evidence that, in 1836, no less than about 80 acres (about two-thirds of the whole bog) remained in the same undivided and unclosed state in which it was at the time of the Down Survey. The interval comprised a period of upwards of 180 years; for the Down Survey, we know, was made about the year 1653. I own that does seem to me to be evidence, not unpersuasive, that the bog was treated by the adjoining owners as an open and undivided tract, to be used in common by such of the owners of the adjoining townlands as used it at all.

Evidence was given that, for a time, not defined by any of the witnesses, certain portions of the bog had been inclosed in places adjoining the different townlands. This would certainly have been consistent either with a title in severalty to the portions of the bog adjoining those townlands (if the inclosures were made by their owners), or with a title and holding by a tenancy in common, the inclosures being made by common consent, or being successful acts of invasion, ousting the co-tenants in common. But the leaving of so large a portion of the bog unclosed and unappropriated for so long a time was, I think, some evidence that the inclosures were not referable to a title in severalty; and whatever

weight may be given to the acts of inclosure at either side, the effect of them, and the inferences to be drawn from them, were, in my opinion, plainly matters for the consideration of the jury.

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The deeds executed between the periods of the granting of the patents and the present time, do little towards solving the question whether there was or was not a tenancy in common. Charles Woodward, who, under the patent of 1666, was entitled to one-third of Glascarn, and the bog thereunto belonging, in fee, and to a remainder in fee-simple in the remaining two-thirds expectant upon the deaths of the two tenants for life, executed in 1683 a deed confirming a lease, which he had previously granted in the same year, of all the premises comprised in the patent. That lease was for twenty-one years; and before it expired, Francis Stoyte, to whom, as a purchaser, all those lands were conveyed by the heir of Charles Woodward, by a deed of the 6th of September 1692, demised them, by a lease of the same date, to Louis Barbour, for fifty-one years from the 1st of May 1693. That lease expired on the 1st of May 1744; and on the 8th of May 1744, John Stoyte (who appears to have been entitled to the estate of Francis Stoyte) demised them, by a lease of that date, to Samuel L'Estrange, for a term of 99 years from the 1st of May 1744. That term expired on the 1st of May 1843; so that the lands of Glascarn, and the bog belonging to them, were continually in lease from 1683 to the 1st of May 1744, save the interval from the 1st of May to the 8th of May 1744. Of the manner in which the persons holding the lands of Glascarn dealt with the bog prior to 1844 there is no evidence, save that a small part adjoining the profitable lands of Glascarn was inclosed. On the part of the plaintiff, a lease was given in evidence, by which Anthony Malone purported to demise, for lives renewable for ever, the lands of Killagbhugh, "containing 103a. 1r. 24p. profitable land" (which was exactly the quantity mentioned in the Down Survey, and in the patent), "and forty acres unprofitable land, be the same more or less." Under this lease the plaintiff showed a deduction of title to her. It was evidence, as an act of ownership asserting

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title in severalty, tending to show that in 1746 there were 60 acres of unprofitable land then dealt with as belonging in severalty to the owner of Killaghee. No evidence was given, that I can collect, as to where those 60 acres were, or when, if at all, that quantity of bog was inclosed or taken into possession in severalty, or whether possession in severalty was ever obtained of it: and however the instrument may have been evidence of possession [*Doe v. Pulman* (a), and cases of that class], neither the instrument itself, nor any possession acquired subsequently to its execution, could have displaced whatever title existed in those who represented Woodward's estate and interest; for the lands of Glascarn, and the bog thereunto adjoining, were leased more than two years before, for a term which did not expire until 1843. If therefore there was a tenancy in common in the bog, acquired by means of the patent under the Acts of Settlement and Explanation, nothing that was done in and subsequently to 1746, by the parties claiming under the lease from Anthony Malone, could have displaced that tenancy in common.

Since the first of May 1843, there has been a disputed possession, which can have no weight in determining the controversy.

I am sorry that I have been obliged, in consequence of the case being one rather of a novel kind, to state at so much length my reasons for holding that the charge of my Lord Chief Justice was right upon the matter of the first objection.

As to the second objection, I think it cannot be maintained that there was *no evidence of possession*, as tenant in common or otherwise, of the *locus in quo*, in the defendant or those under whom he claimed—assuming that such evidence was necessary to sustain the issues upon the defences alleging a tenancy in common. The plaintiff and defendant both claim under common title, by grants from the Crown, founded on the Acts of Settlement and Explanation, and on certificates granted by the commissioners acting under those statutes. The defendant's patent of 1666, which was anterior to that (of 1681) under which the plaintiff derives, recites that the lands and premises granted by it (including the bog belonging to

(a) 3 Q. B. 622.

Glascarn) appeared, by the certificate of the commissioners, to have been "seized, sequestered, disposed, distributed, set out, or set apart," upon account of the rebellion of 1641. It appears therefore that these premises were comprised in one of the allotments made under, or previous to, the Act. The 11th section of the Act of Explanation shows that it was the duty of the commissioners to take measures for putting into possession those who were not already in possession of the allotted lands; which possession was to be retained even while their claim was pending, although subject to a future final decree. In 1683, in 1692, and in 1744, leases were made of the lands of Glascarn and of the bog thereunto belonging. No other bog appears in evidence to belong to Glascarn than the bog in question. The lease of 1692, appearing to be executed by the lessee, was one of the documents in evidence; so also was the lease of 1744. These old leases, coming from the proper custody, are plainly evidence of acts of ownership, after so great a lapse of time, over what was granted by the patent, and was comprised in the allotment. Upon the principle of decision in *Doe v. Pulman* (a), *Clarkson v. Woodhouse* (b), and several other authorities, in connection with the plan of settlement under the two Acts of Parliament and the patent of 1681, I think they are evidence of possession, at a period not long subsequent to the granting of the patent, of what passed by it; and if a tenancy in common in the bog was granted by the patent, I think they were evidence of possession of the predecessors in title of the defendant, as tenants in common. It is to be observed that the plaintiff's patent of 1681 shows the patentee to be in possession of the lands and premises granted by it. When, after the defendant's patent of 1666, Richard Fitzgerald, the patentee under whom the plaintiff derives, took a certificate and a patent, adjudging and granting to him the lands of Killabee, and a tenancy in common in the bog, he accepted a confirmation of his possession in that character; and must be taken, as it appears to me, to have held it in common with the predecessors in title of the defendant, who had acquired, as tenants in common,

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(a) 3 Q. B. 622.

(b) 5 T. R. 412, n. a; S. C., 3 Dougl. 189.

H. T. 1863. an undivided share of the bog, confirmed by an anterior certificate  
*Exchequer.* and an anterior patent. Indeed, according to the law as it then  
 TISDALL prevailed, the possession of one tenant in common was the posses-  
 v. sion of all his cotenants in common ; and that, I apprehend, is still  
 FARNELL. the law, where the possession of one such tenant is not of the  
 entirety, or of more than his share. It cannot be presumed that the  
 commissioners, in allotting Richard Fitzgerald his share of the bog  
 (on the assumption that he acquired only a title to an undivided  
 share of it), allowed him the possession of more than that share, in  
 contravention of their own former adjudication in favor of the  
 Woodward, and of their rights under the patent granted in pur-  
 suance of that certificate. On these grounds, without entering into  
 an examination of the other evidence, I think the second objection  
 cannot be maintained. Of course, in so holding, I assume that I am  
 right in my view as to the first objection. I must say that if what  
 I have stated were not some evidence of possession (supposing such  
 evidence essential), the fact of property of this kind being in lease  
 for nearly a century might render it absolutely impracticable for the  
 owner to assert his title after the expiration of the lease. His  
 lessee may have parted with possession to a stranger the year after  
 the execution of the lease ; and the reversioner, under such circum-  
 stances, could find in living memory no means whatever of proving  
 his possession.

The objection to the discharge of the jury without consent, from  
 finding on the fifth and eighth issues (relating to a right of turbary),  
 is removed by the defendant's consent that a finding should be  
 entered for the plaintiff on each of those issues. Those issues were  
 rendered immaterial by the findings upon the other issues, except  
 for the purpose of costs : these must be very trifling ; in truth,  
 little more, if anything, than the expense of drafting and briefing  
 the issues and the defences on which they were founded ; for there  
 was no evidence given applicable to the fifth and eighth issues only.  
 Although each party would be entitled to the costs of the issues  
 found for him, yet there are authorities for holding that, in strict-  
 ness, the jury may, without consent, be discharged from finding  
 upon an issue which the findings of the jury on other issues renders

immaterial: *Rex v. Johnson* (a); *Powell v. Sonnett* (b). All question however will be closed by the findings being entered for the plaintiff on the fifth and eighth issues; and to this the defendant consents.

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The learned Judge, at the trial, told the jury, in effect (as I collect from his report), that if a tenancy in common was ever created, it would continue until put an end to by partition, operating on the whole, or as to particular parts, of the bog, by an appropriation made by the several tenants in common, with the consent of the others. This would exclude the case of an acquisition under the Statute of Limitations, 2 & 3 W. 4, c. 27, s. 12, by the receipt of one tenant in common, of the entirety, or of more than his share, for a period of twenty years. I was at one time disposed to think that although the report does not show that an objection was taken to the charge of the learned Judge on this ground, yet, since the finding as to a tenancy in common would bind the right, we ought to send the case to a new trial, for the purpose of having the question of exclusive enjoyment, and a title gained by it for the plaintiff, left to the jury. I was also disposed to think that the case was not as satisfactorily investigated by the parties themselves as it ought to have been; and that there ought to have been, and might have been, better and clearer evidence given at both sides, as to the manner in which the bog has been dealt with by all the owners of the adjoining townlands, than was offered at the trial. The plaintiff gave in evidence a lease of 1744, under which she derived, purporting to demise Killahee, with 40 acres of unprofitable land. How those 40 acres were enjoyed, whether they were ever inclosed or held in severalty, or even where they were, were matters left wholly unexplained by any evidence. It did not appear that any exclusive or distinct holding had been created by or under the plaintiff, or those under whom she derived, in any part of the bog, except the two houses at the place where Hafford now lives. The evidence of the plaintiff was applied chiefly to show acts of ownership over the bog during the subtenancy of a man named Glennon, who held all Killahee for about sixteen years, ending in 1839, and subsequently

(a) 5 Ad. & Ell. 468.  
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(b) 1 Bligh, N. S., 552.  
 4 L



H. T. 1863. to that period. Those acts of ownership consisted in the letting of  
*Exchequer.* turf banks for turbary, and in the receipt of money for the privilege  
of cutting and taking turf at those turf banks. On the other hand,  
TISDALL the defendant gave no proof of enjoyment, save in the evidence  
v. which stated (in opposition to the testimony of some of the plain-  
FARNELL. tiff's witnesses) that a plantation, made within twelve or thirteen  
years, was partly on the site of the bog; and by proof of having  
stopped a road, and prevented the plaintiff or those acting under  
her from making a fence, in 1851. That there was a disputed  
possession since the expiration of the lease of 1744, sufficiently  
appeared, I think, upon the evidence. But what portion of the bog  
was inclosed (save the houses near Hafford's and some of the plan-  
tation skirting Glascarn) did not distinctly appear in any part of  
the evidence. I was therefore at one time disposed to say that there  
ought to be a new trial, for the purpose of having the case more  
fully investigated, and also to allow the question to be submitted to  
the jury, whether, from the dominion exercised in reference to the  
two houses at Hafford's, and from modern user of the bog, by letting  
it for turf banks, and acts of ownership of that kind in different  
parts of the bog, the jury would infer a more ancient user, and so  
presume an exclusive possession in the plaintiff, and in those under  
whom she derived, extending back to a period antecedent to the  
lease of the 1st of May 1744; which would be necessary, to give  
to the plaintiff any color of right acquired under the Statute of  
Limitations. But, on consideration, I do not think this course  
ought to be taken. In my opinion, injustice has not been done by  
this verdict. The case for the plaintiff, on the contrary, appears to  
me to be one not to be favored. Regard being had to the evidence  
relied on at the trial, to the struggle to confirm what appears to  
have been done by the Ordnance surveyor in 1836, and to the  
arguments addressed to us at the Bar, the case really made by the  
plaintiff is one of title to the whole of the bog. A title to the  
whole of the bog can only be founded on usurpation; and I think  
one who makes a claim of that nature, as plaintiff, ought to be  
prepared with clear and satisfactory evidence to sustain it at the  
trial.

Again, another ground on which the defendant's allegation that there was originally a tenancy in common is resisted, is, not that an estate and interest in the bog did not pass to the Woodwards by their patent, but that such estate was an estate in severalty in an undefined part of the bog adjoining the profitable land of Glascarn. The place in which the lockspitting was made is not far from the boundary of the profitable land of Glascarn; and if the plaintiff be right in her argument, there would be reason to contend that the lockspitting took place within the portion of the bog which, according to that argument, passed to the Woodwards by the patent of 1666; and that no such possession was acquired by the plaintiff as could bar the defendant under the Statute of Limitations—at least until the 1st of May 1843. Irrespectively of the pendency of the leases of 1683, 1692 and 1744, there must have been not only a dispossession of the defendant, or of those under whom he derives, but also an acquisition of possession in the plaintiff, or those under whom she derives, to confer a title under the Statute of Limitations: *M'Donnell v. McKinty* (a); *Smith v. Lloyd* (b). On the whole, my opinion is, that there was no evidence given at the trial upon which a question ought to have been left to the jury, on which, as reasonable men, they could have found that possession had existed anterior to the lease of the 1st of May 1744, by which the plaintiff, or those under whom she derived, had acquired a title, or the defendant, or those under whom he derived, had lost a title, by the Statute of Limitations: that there was therefore no miscarriage in the charge of my Lord Chief Justice by reason of his not having left a question on that subject to the jury; and that there is nothing in the case which, for the purpose of substantial justice, ought to induce us to set this verdict aside.

A point was made (to which I ought to advert) upon the refusal of my Lord Chief Justice to submit to the jury a map, which on the cross-examination of the defendant's witness, Vaughan, appeared to have been used by him in 1836 before the Ordnance surveyor, when Vaughan objected to the surveyor's yielding to the allegation that the whole bog belonged to Killaghhugh, and objected to the boundary

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(a) 10 Ir. Law Rep. 514.

(b) 9 Exch. 194.

H. T. 1863. *Eschequer.* which the surveyor was then about to adopt for the Ordnance map.  
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*v.* Nothing more clearly illustrates than the present case the extravagance of the proposition, that what was done in the making of the Ordnance survey had or can ever have the least effect on title.  
 FARNELL. The Ordnance surveyor seems to have taken upon himself (acting I presume on such materials as were before him) to trace a boundary, without (as far as appears on the trial) any of the title-deeds being shown him—without the Down Survey being placed before him by any parties interested, and without any authority whatever to bind them. Vaughan's claim to a portion of the bog in severalty might be some evidence to show that in 1886 a claim was made on the part of the defendant, inconsistent with the present claim of a tenancy in common; but to treat what the Ordnance surveyor did as an award binding rights, would be perfectly preposterous. There was no written submission—there was no written award—there was not a particle of evidence to show any authority in Vaughan to submit the defendant's rights to any arbitrator. I am of opinion that the report of the learned Judge shows no ground laid for submitting the map in question as evidence to the jury.

Order for a new trial made absolute.



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*June 4, 5, 6,*  
*12.*

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*Feb. 12.*

KING *v.* HORNSBY.\*

BEERE *v.* SAME.

BAGNALL *v.* SAME.

The 16 & 17 *In* these actions, which were brought against the defendant as  
*Vic., c. 130,* secretary to the Commissioners of Drainage, the several plaintiffs  
*s. 36,* deprives all persons  
 injured by the works of the Drainage Commissioners of Ireland, of the right of proceeding by  
 action or suit to recover damages or compensation, but substitutes certain proceedings before an arbitrator. In case the Commissioners do not serve the notices pre-

\* *Vide Reg., at the prosecution of King, v. The Commissioners of Public Works,*  
 6 Ir. Jur., N. S., 304.

prayed that writs of mandamus might issue directed to the Commissioners, commanding them to serve upon the plaintiffs the notice mentioned in the 16 & 17 *Vic.*, c. 130, s. 13. The facts of each case being similar, save as hereafter mentioned, the first alone was argued. The summons and plaint stated that, from the year 1847 up to the 5th of April 1860, the Commissioners of Drainage carried on certain drainage works in the Brusna river, in the barony of Garrycastle, in the King's County, and took and injured certain portions of the lands of Kincor, Derries, Sherehan, Coole and Ferbane, by making a new channel for the river Brusna, and throwing up large quantities of rocks and gravel upon the lands. That, although the plaintiff had incurred damage to the amount of £300, and although the Commissioners by their draft final award, dated the 5th of April 1860, had declared that the drainage works were then completed, the Commissioners had not delivered, at the usual place of abode of the plaintiff, any notice in writing containing the matters required by the 16 & 17 *Vic.*, c. 130, s. 13. A writ of mandamus was then prayed for, to compel the Commissioners to serve the latter notice.

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The defendant pleaded that, as to the causes of action, and claims to compensation, in respect of the lands of Sherehan, Coole, Kincor and Derries, which accrued prior to the 14th of August 1855, the same accrued more than six years before the enrolment, in the Court of Chancery, of the final award of the Commissioners,

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scribed by the 13th section of that statute, an injured party is barred of all remedy, save by mandamus. A notice was served upon the owner of land injured by the Commissioners, stating that the latter were willing to make the plaintiff compensation for the injuries complained of, and were willing to take all steps necessary to ascertain the amount of such compensation, in case the party injured and the Commissioners should differ about the same.

*Held*, that the fact of the person injured not having replied to that notice was no answer to the charge of non-service of the notice prescribed by the 16 & 17 *Vic.*, c. 130, s. 13.

The limitations contained in the 10th section of the 18 & 19 *Vic.*, c. 110, are imported into the provisions of the 9th section of the statute; consequently, the enrolment of the final award, pursuant to the 16 & 17 *Vic.*, c. 130, is an answer now, as it would have been before the passing of the 18 & 19 *Vic.*, c. 110, to a summons and plaint which does not show that the injuries are such as compensation could be made for under a further award.

To an action for a writ of mandamus to enforce the holding of an arbitration, under the 16 & 17 *Vic.*, c. 130, it is a good plea, that the injuries complained of occurred six years before the enrolment of the final award, or six months before the enrolment of the supplemental award, pursuant to the 18 & 19 *Vic.*, c. 110.

H. T. 1862. upon the 27th of April 1860. And, as to so much of the injuries  
Exchequer. to the above lands as occurred subsequent to the 14th of August  
 KING 1855, the defendant pleaded that the same occurred after the passing  
 v. of the 18 & 19 Vic., c. 110, and that all causes of action and claims  
 HORNSBY for compensation in respect thereof accrued more than six months  
 before the enrolment of the final award.

So far the pleadings in the three actions were identical; but in *King v. Hornsby* the following defence (fourth) was pleaded, as to the lands of Ferbane:—"And, as to so much of the "said plaint as refers to the said lands of Ferbane, the defendant "says that the said Commissioners did not refuse to serve such "notice as by the summons and plaint they are required to serve; "for they say that, before the commencement of this suit, they "served upon the said plaintiff a certain notice in writing, stating "that the said Commissioners were willing to make the plaintiff "compensation for all such injuries, and were willing to take all "steps necessary to ascertain the amount of such compensation, in "case the said plaintiff and the said Commissioners should differ "about the same, to which notice the said plaintiff never made "any reply; and, save to the extent and in the manner, and at "the times hereinbefore mentioned, the defendant says, the said "Commissioners of Drainage did not take or injure any lands of "the said plaintiff, in manner and form as in the said plaint "alleged."

It was also pleaded (fifthly) that the amount of the moneys chargeable on the drainage district in question was fixed by the final award; that no sum of money in respect of the plaintiff's alleged claim was included in the award. That, as to the grievances committed more than six years before the enrolment of the final award, the Commissioners had no power to make any compensation; and that the Commissioners in their discretion did not deem it expedient to make any supplemental award in respect of the last-mentioned grievances.

During the argument, the third and fifth defences were ordered to be amended, by applying the same to the 14th of August 1855, as well as to the other periods of time therein mentioned,

and by inserting the words "proper or" before the word "expedient." To all these defences the plaintiffs demurred.

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*E. M. Kelly* (with whom was Serjeant *Sullivan*), in support of the demurrer.

The service of the notice directed by the 13th section of the 16 & 17 *Vic.*, c. 130,\* is imperative. After the making of the final award directed by the latter statute, the Commissioners may make a further award on foot of claims for compensation made after the completion of the works, "in case they deem it proper or expedient so to do:" 18 & 19 *Vic.*, c. 110, s. 9. The latter words should be construed in their widest sense, as imposing a duty upon the Commissioners: *Hughes v. The Overseers of Chatham* (a); *Rex v. The Inhabitants of Banbury* (b); *Rex v. The Inhabitants of Ramsgate* (c); *Samuel v. Nettleship* (d). Assuming that the Commissioners had a discretion, a writ of mandamus will be granted to compel them to exercise it: *Regina v. The Mayor and Assessors of Rochester* (e). As to the limitation of time in this form of action,

(a) 5 *Man. & G.* 80.

(b) 1 *Ad. & Ell.* 142.

(c) 6 *B. & C.* 715.

(d) 3 *Q. B.* 192.

(e) 7 *Ell. & B.* 910; *S. C.*, 4 *Jur.*, *N. S.*, 1227.

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\* 16 & 17 *Vic.*, c. 130, s. 13—"The said Commissioners of Public Works shall cause notices in writing, specifying therein, with reasonable certainty, the quantity of land taken, or required to be taken, or injured, or liable to be injuriously affected, and the nature of the injury that may be done, or proposed to be done thereto, to be delivered to or left at the usual places of abode of the proprietors or occupiers, or reputed proprietors or occupiers, and all persons interested (when the same may be known to the Commissioners), of and in all such land as may be or have been taken, or required to be taken for, or be or have been injured, or liable to be injuriously affected by, the works made, or proposed to be made, under the said recited Acts and this Act, requiring such proprietors, occupiers or other persons, on or before a day to be named in such notice, to prefer their respective claims to such Commissioners for the value of such land, or the particulars of the title of the party making such claim thereto; and that, in case the Commissioners, and the parties making such claim, shall not agree as to the amount thereof, that a meeting will be held by the arbitrator to be nominated for the purpose, as hereinafter mentioned, for inquiring into all such claims; and the said Commissioners shall, if they see fit, cause a like notice to be published in some newspaper circulating in the county or counties in which such land as aforesaid shall be situate."

T. T. 1862. *Exchequer.* a mandamus must be applied for within a reasonable time: *Regina v. The Rev. E. J. Townsend* (a). It was refused after the lapse of sixty-five years: *Regina v. The Leeds and Liverpool Canal Co.* (b).  
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 HORNSBY. As to when it will lie, 3 *Blackstone's Com.*, p. 116 (ed. of 1857); *Common Law Procedure Act* 1856, s. 71. The writ of mandamus will not issue to fulfil a mere personal duty: *Benson v. Paull* (c). The Statute of Limitations cannot be pleaded to an action of mandamus: *Ward v. Lowndes* (d). The Statute of Limitations can have no application to this action, because no person can take any proceeding, at law or in equity, against the Commissioners, for damages or compensation: 16 & 17 *Vic.*, c. 130, s. 86; *Moore v. Hornsby* (e). It is true that the 10th section of the 18 & 19 *Vic.*, c. 110, declares, "that no claim for compensation or damages in "in respect of any act or omission of the Commissioners, or by "reason of any works done by them, shall be made by action, suit "or otherwise, save within six months after the act complained "of;" but the 11th section of that statute declares that nothing therein should be deemed to repeal, alter or abridge any of the provisions of the 16 & 17 *Vic.*, c. 130. The 18 & 19 *Vic.*, c. 110, s. 10, was intended to apply to such cases as *Sharpley v. Hornsby* (f), *Malley v. Hornsby* (g), *Regina v. The Commissioners of Public Works* (h), where the Commissioners had acted in excess of their powers; but where Commissioners have not acted in excess of the powers given by a statute, an action at law will not lie against them: *The Governor and Company of Cast-Plate Manufacturers v. Meredith* (i); *Boulton v. Crowther* (h). The Commissioners had no discretion under the words "think fit and expedient:" *Mortimer v. Watts* (l); *Willis v. Childe* (m). The

(a) 28 Law T. 100.

(b) 11 Ad. & Ell. 316; S. C., 3 Per. & Dav. 174. (c) 6 Ell. & Bl. 273.

(d) 6 Jur., N. S., 247; S. C., 28 Law Jour., Q. B., 265; S. C., in *Cam. Sec.*, 29 Law Jour., Q. B., 40.

(e) 2 Ir. Jur., N. S., 399.

(f) 2 Ir. Com. Law Rep. 590.

(g) 3 Ir. Com. Law Rep. 381.

(h) 5 Ir. Com. Law Rep. 113.

(i) 4 Term, 794.

(h) 2 B. & C. 703.

(l) 14 Beav. 616.

(m) 13 Beav. 117; S. C., 3 Myl. & Cr. 242.

writ of mandamus will render legal any act done by the Commissioners: *The Mayor of Rochester v. Regina* (a); *Regina v. The Deptford Pier Company* (b); *Regina v. St. Michael's, Southampton* (c); *Ward v. Lowndes* (d).

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*G. May* (with whom was the *Solicitor-General* and *A. Brewster*).

The action of mandamus given by the Common Law Procedure Act 1856 is a personal action. The 18 & 19 *Vic.*, c. 110, s. 10, limits the time within which the Commissioners should make their award, and the time within which all claims for damages should be made. Again, by the 16 & 17 *Vic.*, c. 130, s. 13, a discretion is given to the Commissioners; therefore a mandamus will not issue to control that discretion: *Regina v. The Commissioners of Paving* (e). Here, the plaintiff's claim is barred by the 18 & 19 *Vic.*, c. 110, ss. 9-10; consequently, this case is the very exception put by Martin, B., in *Ward v. Lowndes* (f). The final award relative to the lands in question was enrolled on the 27th of April 1860. The plaintiff should have given notice to the Commissioners that he wished them to hold an arbitration as to his lands, and the injuries done to them: *Regina v. The Trustees of Swansea Harbour* (g). The plaintiff, by his own neglect, lost his right to damages. The discretion of the Commissioners had of necessity to be exercised before the arbitration was held; and, having heard no complaint from the plaintiff, they did not deem it necessary to hold any arbitration in reference to his lands.

Serjeant *Sullivan*, in reply.

The Commissioners were bound to serve notice upon the plaintiff: *Regina v. The Trustees of the Norwich Road* (h). As to judicial discretion, he cited *Wright v. Hall* (i) and *Luther v. Bianconi* (k).

(a) 4 Jur., N. S., 1227.

(b) 8 Ad. & Ell. 910.

(c) 6 Ell. & Bl. 807.

(d) 6 Jur., N. S., 247; S. C., 25 Law Jour., Q. B., 265; S. C., in *Cam. Soc.*, 29 Law Jour., Q. B., 40.

(e) 9 Ir. Law Rep. 448.

(f) 29 Law Jour., Q. B., 42.

(g) 8 Ad. & Ell. 439.

(h) 5 Ad. & Ell. 563.

(i) 6 Hurl. & Nor. 227.

(k) 10 Ir. Chan. Rep. 194.

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FITZGERALD, B., delivered the judgment of the Court.

This is an action against the Drainage Commissioners of Ireland, in their corporate or *quasi*-corporate capacity, for the purpose of obtaining a writ of mandamus, commanding them to deliver to the plaintiff, as the proprietor of certain lands in the King's County, the notice mentioned in the 13th section of the 16 & 17 *Vic.*, c. 130.

The delivery of this notice is sought on the grounds that it is the duty of the Commissioners to deliver it, and that the performance of such duty is necessary, in order to enable the plaintiff to obtain "reparation" for certain acts of the Commissioners, whereby they have injuriously affected his lands.

The plaint states the injurious acts alleged to have been done to the plaintiff's lands, which are called Sherehane, Coole, Kincoore, and Derries and Ferbane. It avers that they were done at divers times, from January 1847, up to and ending with the month of April 1860; and were done by the Commissioners in carrying on, under the provisions of the Drainage Acts, certain works in a district in the King's County. It states the plaintiff's title to the lands, and the amount of damage. It states that the Commissioners, on the 5th April 1860, by a draft award of that date, declared the works in the district completed; and avers that (though required) they have not delivered to the plaintiff the notice in question, but have wholly neglected so to do.

What is sought by the action is, not remedy by way of compensation for the injuries to the lands, but the performance of an act by the Commissioners, which is supposed to be necessary in order to enable the plaintiff, and which will enable him, to make a claim for compensation in some other proceeding. The cause of action is, the neglect of the Commissioners to perform the duty of delivering to the plaintiff the notice mentioned in the 13th section of the 16 & 17 *Vic.* c. 130.

The 16 & 17 *Vic.*, c. 130, is one of a code of many Acts relating to the drainage of lands in Ireland. It was passed on the 20th August 1853, and its 36th section provides that where any person shall consider himself entitled to be paid compensation or damages for any act or *omission* by the Commissioners, or for or by reason of

any works or acts whatsoever, done or professed to be done by the Commissioners, in pursuance of the provisions of the previous Drainage Acts or that Act, such person shall not be entitled to proceed at law or in equity for or in respect of the same; but the right to such compensation or damage shall be ascertained in the manner thereinbefore provided, and not otherwise, anything in the said Acts to the contrary notwithstanding.

The manner of ascertaining such compensation or damage, and the amount thereof, is provided for by the several sections of the Act, from the 11th to the 29th, both inclusive; and it is an essential part of the plaintiff's case here, that, whether an injured party shall or shall not have a remedy against the Commissioners at all, has been made by the Legislature dependent on whether he has or has not been served by the Commissioners with the notice mentioned in the 13th section. The plaintiff's position is, that if the Commissioners think fit to omit or neglect to serve such notice, the Legislature has left the injured party without remedy; and on the maintenance of that position, the right of action alleged by the plaintiff depends.

Under the code of Drainage Acts, up to and including the 16 and 17 Vic., c. 130, the amount of all compensation paid or payable to an injured party must have appeared by a final award of the Commissioners, made and enrolled in Chancery; and after such final award made and enrolled, it was not competent to the Commissioners, *as such*, to pay any moneys as compensation or damages to an injured party, the amount of which was not included in such final award. The award made and enrolled would have been a conclusive answer to any claim for such compensation or damage against the Commissioners, *as such*.

The plaintiff in this case does not state that any final award was made and enrolled.

As however some of the defences, which I shall presently mention, stated that in fact a final award had been made and enrolled on the 27th April 1860, it became necessary to consider how far the plaintiff's right of action was thereby affected.

A subsequent Act, the 18 & 19 Vic., c. 110, which was passed on the 14th August 1855, after having, by its 9th section, recited cer-

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tain provisions of the 16 & 17 *Vic.*, c. 130, and further recited that it frequently happens that claims are made after the completion of the works in the district, *and in respect of which the award has been made* or is about to be made, and at times when there are no funds in the Commissioners' hands or otherwise available to the payment of such claims, and that it is expedient to authorise the Commissioners in such cases, *within such limited times as thereafter mentioned, in case it shall in their discretion seem expedient so to do*, to make a further or additional award, for the purpose of charging the amount of compensation *which may be found due* to any person, upon the proprietors of lands in the district, and *to limit* (i. e. that it is expedient to limit) *the time within which all claims for compensation or otherwise shall be made*,—enacts, that in all cases where, *after the completion of the works in a district*, whether before or *after the making of the final award*, any person *shall be awarded or otherwise entitled to be paid purchase-money or compensation in respect of injury arising from such drainage or the works incidental thereto*, it shall be lawful for the Commissioners, *in case they deem it proper or expedient so to do*, by the first, or by an additional award or awards, in such form as they may think proper, to charge upon the lands of the proprietors within such district the amount which may be found to be due for such purchase-money or compensation, to be paid to the person entitled to be paid the same when the same shall be received by the Commissioners.

The 10th section then provides that no claim for compensation or damages, in respect or by reason of any act or omission of the Commissioners, or for or by reason of any works whatsoever done or professed to be done by the Commissioners, shall be made, *by action, suit, or otherwise*, save within six months after the act complained of.

The 11th section provides that nothing in the Act contained shall be deemed, taken, or construed to repeal, alter, or abridge any of the provisions contained in the 16 & 17 *Vic.*, c. 130.

Thus much seems clear from these provisions, that the power of taxation, unlimited in amount, thus given to the Commissioners, through an additional award to be made by them, is limited to cases in which a claim for compensation shall have been made by action,

suit, or otherwise, within six months after the act complained of; and that, after the 16 & 17 *Vic.*, c. 130, such claim can only be made and enforced in the manner by that Act provided.

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In construing these provisions, it was contended on the part of the plaintiff that they plainly contemplate the case of a claimant awarded or found entitled to compensation, in the manner provided by the 16 & 17 *Vic.*, c. 130, after final award made; and that, though it may be true that it is in the discretion of the Commissioners whether the compensation to which the right shall have been so ascertained shall be charged on the district or not, yet the occasion for exercising such discretion arises only on the ascertainment of the right; and that, consequently, the existence of such discretion *in posse* is no answer to a proceeding for the purpose of enforcing an investigation or ascertainment of the right, through the only means provided by the Legislature.

The defendants have pleaded three distinct defences, as to, first, the lands of Sherehane; secondly, Coole; and thirdly, Kincore and Derries.

By the first defence they admit certain of the injurious acts alleged (traversing the residue), but aver that a final award was duly enrolled on the 27th April 1860; and that all causes of action, and claims for compensation in respect of the injuries, accrued to the plaintiff more than six years before the enrolment of the award.

The second defence admits the injuries alleged, but avers that the injuries were done more than six years before the enrolment of the award.

The third defence divides the injuries, which it admits, into two classes; those committed prior to the 14th August 1855, and those committed since. As to the former, it avers that all causes of action and claims for compensation accrued more than six years before the enrolment of the final award; and as to the latter, that they were committed after the passing of the 18 & 19 *Vic.*, c. 110; and that all causes of action and claims for compensation accrued more than six months before the enrolment of the award.

Each of these three defences has been demurred to.

H. T. 1863. In support of the demurrers, it was contended that there is no  
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 HORNSBY. Statute of Limitations applicable to the action of mandamus.  
 Assuming that to be so, it seems to me a mistake to treat these  
 defences as pleas of any Statute of Limitations to the action of  
 mandamus.

The alleged cause of action here is not the denial of compensation for injury by the defendants, but their neglect to perform the duty of delivering a notice to the plaintiff.

The defences do not aver that *this* cause of action is out of date ; they do not deny that, if the plaintiff had an existing claim for compensation, he might enforce the performance of the duty at any time in this form of action ; but, treating the existence of the claim as necessary inducement to the action, they aver that, by reason of lapse of time, it does not exist.

The performance of the duty is sought only as the means of enabling the plaintiff to make a claim for compensation of the injuries alleged by another proceeding ; and the answer is, that no such other proceeding is possible.

It seems to me clear that the existence of a claim for compensation enforceable, is a matter of necessary inducement to this action ; and that, consequently, the only question as to these defences is, whether they sufficiently show that no claim for compensation enforceable exists.

I am of opinion that they do show this ; because they show that all claims of compensation, in respect of the injuries to which they apply, were barred by statute at the date of the enrolment of the final award, on the 27th April 1860.

If that be so, the delivery of the notice claimed could not enable, and therefore cannot be necessary to enable, the plaintiff to make a claim for compensation in the manner provided by the 16 & 17 Vic., c. 130.

But for the statute 18 & 19 Vic., c. 110, the enrolment of the final award would, of itself, have rendered any proceeding to obtain compensation for these injuries against the Commissioners, *as such*, impossible ; and that statute renders such proceeding, after final

award possible only when made within six months after the injury complained of. H. T. 1863.

As to the form of these defences, the case of *Macfadyen v. Olivant* (a) shows that if the time pleaded as bar be larger than, and include, the time mentioned as bar in a Statute of Limitations, that will be sufficient on general demurrer.

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In my opinion therefore the demurrers to the three first defences fail.

The fourth defence relates to the lands of Ferbane, and avers that the defendants did not neglect to serve the notice required by the summons and plaint; for that they did serve a notice, stating that they were willing to make the plaintiff compensation for the injuries complained of, and were willing to take all steps necessary to ascertain the amount of such compensation, in case the plaintiff and the Commissioners should differ about the same; to which notice the plaintiff made no reply.

This defence has also been demurred to.

Supposing that it was the duty of the defendants, under the circumstances stated in the plaint, as to Ferbane, to have delivered the notice mentioned in the 13th section of the 16 & 17 Vic., c. 130, and that service was necessary to the plaintiff enforcing a remedy for the injuries, I am of opinion that this qualified traverse of neglect so to do is no answer to the plaint; and that, consequently, the demurrer to the fourth defence is well founded.

The fifth defence is to the whole plaint, except as regards the same lands of Ferbane; it states that all the works of the Commissioners, in the district in question, were completed before the 27th of April 1860, and all the moneys within the control of the Commissioners, payable for compensation for lands injured before the said day, were wholly expended; it states the enrolment on that day of the final award, whereby all sums payable for compensation were fixed and ascertained; that the award did not include any sums payable to the plaintiff in respect of the injuries alleged; that the Commissioners have not in their possession, power, or control, any moneys applicable to the payment of the plaintiff

(a) 6 East, 387.

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as compensation for the injuries alleged; that all those injuries were committed prior to the enrolment of the final award; that the Commissioners do not in their discretion deem it expedient to make, and do not intend to make, any further or supplemental award under the statute in that behalf, for the purpose of charging the district with any sums as compensation to the plaintiff in respect of the injuries alleged; and that service of the notice required is a step preliminary merely to ascertainment of the amount of damage payable to the plaintiff in respect of such injuries. This defence has also been demurred to.

The defence appears to have been pleaded for the purpose of raising the question, whether the mere making of the final award alone gives occasion to the exercise of the defendants' discretion as to the making of any further award, so as to enable them to preclude investigation of any claim for compensation not thereby provided for; or whether this be a discretion to be exercised only after investigation and ascertainment of the claim in the manner provided for by the 16 & 17 *Vic.* c. 130. This is a question which I am not anxious unnecessarily to decide, and in the present case it does not seem to me necessary to do so. It seems to me that the fifth defence, as applied to the plaint, sufficiently shows that the defendants have not authority to make a supplemental or further award, charging compensation for the injuries to which it applies. The defence shows that all the injuries, to which it applies, were committed before the enrolment of the final award, and were not thereby provided for.

Now that appears to me a sufficient answer to a plaint such as this, which does not show that the injuries complained of belong to the class for which, and for which only, the 9th section of the 18 & 19 *Vic.*, c. 110, was intended to provide.

I am of opinion that, reading the recitals of the 9th section in connection with the 10th, the limitations of the 10th section must be considered as imported into the purview of the 9th; and that consequently, the final award enrolled is an answer now, as it would have been before the 18 & 19 *Vic.*, c. 110, to a plaint which does not show that the injuries are such as compensation

could be made for under a further award. Whether this might be remedied by a replication seems unnecessary to consider, because it appears to me, as already stated, that the three first defences do, in any event, contain a sufficient answer to the plaintiff's case in respect of the same injuries. The result is, that in my opinion the demurrers to the first, second, third, and fifth defences ought to be overruled.

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As to the demurrer to the fourth defence, that seems to me well founded; but with reference to that, the defendants have insisted on their right to fall back on the summons and plaint; and in objection to the summons and plaint it is urged, that the delivery of the notice mentioned in the 13th section of the 16 & 17 Vic., c. 130, is not a condition precedent to the plaintiff's having his claim for compensation investigated and ascertained.

I confess that, however much I might regret it on the plaintiff's account, I have felt much anxiety to adopt the view of the defendants in this case. There seems something so shocking in making the right of compensation to an injured party depend on the taking of a preliminary proceeding by the party who has injured him, which it is in the power of that party to do or omit, that I have felt most unwilling acquiesce in the conclusion that it could ever have been intended by the Legislature. Extraordinary and anomalous as are the powers given throughout this code of law to the arbitrary tribunal which it has constituted, this seems almost incredible. But the Legislature must be taken in its wisdom to know the parties in whom it has confided; and after the most anxious consideration, I have been unable to satisfy myself that the Commissioners have not this power of depriving, if they will, the party injured of any remedy, other than such as may be undoubtedly conferred through the extraordinary proceeding by mandamus.

I have already stated the section of the 16 & 17 Vic., c. 130, which confines the injured party to the remedy provided by the Act, and takes away every remedy in law or equity beside. The remedy provided by the Act is, by investigation before an arbitrator, when the Commissioners and the party injured do not agree.



H. T. 1863. The 11th section gives to the Commissioners of the Treasury  
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**HORNSBY.** power to appoint two or more persons to be arbitrators for the purpose of the Act. After, by the 13th section, making it the duty of the Commissioners to serve the notice in question here, on every proprietor whose land is injured or supposed to be injured, the Commissioners are empowered, in certain specified cases, by the 14th section, to nominate one of the persons so appointed by the Commissioners of the Treasury, to be an arbitrator, for the purpose of ascertaining the purchase-money or compensation, if any, to be paid for in respect of *the lands*, or any injury, loss or damage thereto, *mentioned in any such notice given by the Commissioners.*

The specified cases are—the neglect or refusal of any person authorised by the Drainage Acts *to contract for, sell, and convey any lands*, to treat; or his not agreeing with the Commissioners, or his want of power to agree, by reason of absence or disability; or his not being found or known; or his not proving a clear title to the land, or to the estate and interest which he shall claim therein, to the satisfaction of the Commissioners.

By the 17th section, upon the arbitrator's nomination, the Commissioners shall deliver to him *a copy of the notice given by them*, together with a map, if any, of the premises *referred to in the said notice*, and all claims sent in to the Commissioners *pursuant to such notice*; and thereupon the arbitrator is to issue his summons *to all parties concerned in the matter so referred to his arbitration.*

On a liberal construction of the 15th and 18th sections, it might perhaps be held that, when the arbitrator had once commenced the inquiry pursuant to a notice, he might entertain the claims of parties who, or whose lands, were not specified in the notice. But unless an arbitrator has been nominated for the purpose of lands specified in a notice, I see no means which a party injured can resort to for the purpose of obtaining compensation.

I cannot think it necessary that the plaintiff should negative the service of any notice on any one, or the nomination of an arbitrator for the purpose of the Act.

I am therefore disposed to think the plaintiff sufficient, and that the demurrer to the fourth defence ought to be allowed.

Demurrer allowed.

M. T. 1862.  
Exchequer.

## BOYD and others v. FITT.

Nov. 22, 24.  
H. T. 1863.  
Jan. 31.

THIS was an action, brought by the plaintiffs against the defendant, for damages alleged to have accrued to them, by reason of the defendant's violation of his duty as agent to the plaintiffs. By an agreement in writing between the parties, the defendant undertook to act as agent in Glasgow for the plaintiffs, who were provision agents and cattle salesmen in Dublin, for a commission, which was guaranteed to amount to £250 per annum: either party to be at liberty to revoke the agreement by giving three months' notice. The agreement contained the following proviso:—"That the said William Fitt do procure the sum of £500, or obtain a cash credit to that extent at a Glasgow bank; and that he do open a bank account, in his own name, with this capital, to be used, at any time that it may be necessary, in honoring and retiring the cash orders of George W. Boyd & Co. The said G. W. Boyd & Co. agreeing hereby that in no instance or occasion whatever will they pass any cash order on said W. Fitt without the said W. Fitt having the full amount of such orders in his hands, either in cash or goods, previous to his being required to pay same."

The summons and plaint then averred that, while the defendant had in his hands, on the 1st of February 1862, £350 cash, and cattle and goods to the amount of £675, belonging to the plaintiffs, he abandoned his duty, and absconded from Glasgow, and did not

cash in bank, and goods in hands, amounting to more than the £500, upon the day on which a cash order for £250 fell due in Glasgow, the defendant left that city, and the order was returned dishonored to Dublin. It having been proved that, in consequence of the cash order having been dishonored, the plaintiffs' trade in Glasgow was suspended, that their Dublin business was seriously impaired, and that they had lost the agency of an Australian firm; the jury gave damages for loss upon each of those heads.—*Held*, that no portion of the damages was too remote, as the losses flowed naturally from the default of the defendant.

*Semble*—That the rule laid down in *Hadley v. Baxendale* (9 Exch. 341) is too strict, and that *Smeed v. Frood* (Ell. & Ell. p. 614), and *Gee v. The Lancashire and Yorkshire Railway Company* (8 Hurl. & Nor. 221) contain sounder expositions of the law as to the proximate or remoteness of damage.

The defendant, under an agreement in writing, undertook to act as agent in Glasgow for the plaintiffs, cattle and provision dealers in Dublin; part of the agreement was, that the defendant should open a cash account at a bank in Glasgow, to the amount of £500, to be used at any time in honoring and retiring cash orders of the plaintiffs. It was also agreed that no cash order would be drawn by the plaintiffs without the defendant having in his hands the full amount of such orders previous to his being required to pay the same.

While the defendant had

M. T. 1862. pay cash orders drawn by the plaintiffs to the amount of £600, and payable on the 1st, 3rd and 4th of February.

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The cash orders were returned dishonored to, it was averred, the special damage of the plaintiffs, whose credit and business were thereby injured. The defendants, by consent, pleaded the general issue. The evidence is stated at length in the judgment of the LORD CHIEF BARON, who, at the trial, allowed the names of certain persons who had withdrawn their business from the plaintiffs, in consequence of their bills having been dishonored, to be introduced into the summons and plaint, in addition to those therein mentioned. The case was tried before the LORD CHIEF BARON, at the Sittings after Trinity Term 1862, when the jury, under his Lordship's direction, divided their verdict into the three different heads of damage alleged to have been suffered by the plaintiffs, and found £110 for damage resulting to the Glasgow business, viz., £65 loss on sales of beef, and £45 loss on sales of cattle; £70 for loss on general agency; and £120 for loss, in consequence of G. Martin having withdrawn his agency—total £300.

A conditional order for a new trial having been obtained by the defendant, upon the grounds of the damages being too remote, and of a wrongful amendment having been made at the trial—

*J. T. Ball* (with whom was *D. C. Heron*) now showed cause.

The damages given are not too remote. As to the measure of damages in such cases: *Smeed v. Foord* (a); *Rigby v. Hewitt* (b); *Dunlop v. Higgins* (c); *Marsetti v. Williams* (d); *Waters v. Towers* (e); *Randall v Raper* (f).

*J. E. Walsh* (with whom were Serjt. *Sullivan* and *J. O'Hagan*), contra.

The damages given for the withdrawal of his business from the plaintiffs, by Martin, are too remote. Martin's withdrawal was not

(a) ELL. & ELL. 614; S. C., 5 Jur., N. S., 291.

(b) 5 Exch. 240, 243.

(c) 1 H. of Lda. 381.

(d) 1 B. & Ad. 415.

(e) 8 Exch. 401.

(f) ELL., B. & ELL. 84.

the natural consequence of the defendant's conduct: *Hadley v. Baxendale* (a); *Gee v. The Lancashire and Yorkshire Railway Company* (b); *Wilson v. The Lancashire and Yorkshire Railway Company* (c); *Hoey v. Felton* (d); *Priestly v. Maclean* (e); *Archer v. Williams* (f); *Lynch v. Knight* (g).

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BOYD

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*D. C. Heron*, in reply.

The LORD CHIEF BARON delivered the judgment of the Court.

H. T. 1863.

Jan. 31.

This action was brought to recover damages for the breach of a written unsealed agreement, dated the 13th of December 1861. The agreement was expressed to be made between George W. Boyd, of No. 19 Eden-quay, trading as George W. Boyd & Co., "provision merchants, cattle salesmen," &c., and the defendant. It recited that James Earl Leet, of 49 East Havard-street, Glasgow, had been for some years past acting as general agent at Glasgow to said George W. Boyd & Co., for the sale of beef, cattle, butter, bacon and general goods; and that it became desirable to remove said J. E. Leet from such trust; and the agreement witnessed that, "for and in consideration of the said William Fitt taking up the position of said J. E. Leet, the said George W. Boyd & Co. did thereby agree to allow "said William Fitt," &c. The agreement then proceeded to specify the emoluments which Fitt was to receive, and to guarantee, on the part of Boyd & Co., that those emoluments should not be less than £250 a-year. It contained, amongst a variety of provisions, a stipulation on the part of Fitt "to faithfully and honestly serve and work for the said "Boyd & Co. It contained a stipulation that the agreement should remain in force for nine months, at the end of which period either party should be at liberty "to revoke" the arrangement, by giving three months' notice. It contained also the following provisions:—"That said William Fitt do procure the sum of five "hundred pounds, or obtain a cash credit to that extent, at a Glas-

(a) 9 Exch. 341.

(b) 6 Hurl. &amp; Nor. 211.

(c) 9 Com. B., N. S., 632; S. C., 3 Law T. 328.

(d) 11 Com. B., N. S., 142.

(e) 2 Fost. &amp; Fin. 288.

(f) 2 Car. &amp; Kir. 26.

(g) 5 Law T., N. S., 291.

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“gow bank ; and that he do open a bank account in his own name  
 “with this capital, to be used, at any time that it may be necessary,  
 “in honoring and retiring the cash orders of George Boyd & Co. ;  
 “the said George Boyd & Co. agreeing hereby, that in no instance  
 “or occasion whatever will they pass any cash order on said Wil-  
 “liam Fitt without the said William Fitt having the full amount of  
 “such orders in his hands, either as cash or goods, previous to his  
 “being required to pay same.” The agreement also provided that  
 the defendant should have full power and authority to receive all  
 moneys and goods whatever sent to Glasgow, addressed either by or  
 to the said George Boyd & Co., and to use the proceeds of every-  
 thing that may come to his hands, as agent, to discharge the cash  
 orders of the said George Boyd & Co. The agreement provided for  
 the payment of a clerk, if appointed by Boyd & Co.

The evidence was very voluminous ; but a comparatively small  
 part of it only need be referred to, for the purpose of indicating the  
 questions on which we have to decide, and of explaining our judg-  
 ment. It appeared that the Glasgow business of the plaintiffs (who  
 were the sale partners in the firm of Boyd & Co.) consisted chiefly  
 of two branches—first, they forwarded every week, and sometimes  
 twice in the week, quantities of fresh beef, to be delivered in Glas-  
 gow, to purchasers who were engaged there in the process of curing  
 beef. Secondly ; they forwarded cattle to be sold in the Glasgow  
 market ; the beef (or provision) trade they conducted on their own  
 account ; the cattle business they conducted as salesmasters or com-  
 mission agents—sometimes advancing money to the owners of the  
 cattle which they forwarded for sale. In order to keep themselves  
 in funds, they cashed chiefly at the Royal Bank, in Dublin, and  
 sometimes with a private individual there, cash orders, drawn by  
 Boyd & Co., payable at a Glasgow bank, to be there paid by their  
 agent with the funds in his hands applicable for that purpose. Such,  
 as I collect, was the course of dealing in the time of their former  
 agent Leet, whose position, according to the agreement, was to be  
*taken up* by the defendant. The defendant began to act on the 25th  
 of January 1862, and was on that day introduced to several of the  
 customers of the plaintiffs, by the plaintiff Boyd, who was then in

Glasgow, and who desired them thenceforward to pay the defendant. And the defendant was also on that day put into possession, by Boyd, of goods, consisting of beef, which Boyd had brought from Dublin in a steamer, to the value of about £300. The plaintiffs gave to the Steam Packet Company an order, authorising the delivery to the defendant of the goods shipped by the plaintiffs in the company's vessels. In the course of a very few days, the defendant, from causes to which it is unnecessary to refer (save by stating that they appeared in result to be connected with an apprehension of the risks incurred in the dealings) became averse to continuing in the situation; and it was arranged between Boyd and him that, as soon as another agent could be procured, he should be permitted to retire. An advertisement was inserted in one of the Glasgow newspapers, with the defendant's privity, seeking a person to fill the intended vacancy, and describing the required qualifications. Under circumstances, which it is unnecessary to detail, the defendant had, prior to the 1st of February, advanced sums of money to pay money orders, before a sufficient amount of money or of goods, destined to secure the amount of those orders, had reached the defendant. This he voluntarily did. On the 1st of February, a sum of £350 was put into the defendant's hands by the plaintiff Boyd, which would still have left a balance due of his advances. On the morning of the same day a steamer from Dublin reached Greenock, about half-past nine o'clock, and arrived in Glasgow some time after eleven o'clock, bringing about £300 worth of beef, which, in pursuance of orders previously sent from Glasgow, with the defendant's privity, to the plaintiffs' house in Dublin, was invoiced to certain customers in Glasgow. In the ordinary course of business, those goods, when taken from the vessel, would be weighed and delivered, under the defendant's superintendence, to the customers, who would pay the amount to the defendant. The same vessel also brought cattle to the value of about £300, on which, in Dublin, the plaintiffs had made considerable advances of money to the owners. The amount of the beef alone, in addition to the £350, would have much more than covered the amount of the balance due to the defendant, and of the bill payable at the Glasgow bank. About ten o'clock on the

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H. T. 1863. morning of the 1st of February, a clerk of the plaintiffs, named Exchequer.  
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FITT. Gawl, who had proceeded from Dublin in the steamer, in charge of the goods and cattle, came to the office of the plaintiffs in Glasgow, where the defendant acted as agent, having travelled by railway from Greenock, and having thus arrived at the office before the vessel reached the quay at Glasgow. He brought the invoices of the beef, and placed them in the office, where the plaintiff Boyd then was. The defendant soon after, before eleven o'clock, came into the office, learned the arrival of the vessel at Greenock, and thereupon entered the invoices of the beef, and the particulars of the cattle, in the book which was kept by him in the office, and which showed the receipt and disposal of the goods; and the Glasgow clerk, named M'Kay, employed in the plaintiffs' office there, was sent by the plaintiff Boyd and the defendant to the quay, where the vessel was to arrive, "to see about the cattle." The vessel arrived before twelve o'clock.

On Saturday the 1st of February, a money order for £250, drawn by Boyd & Co., in Dublin, and payable at a Glasgow bank, became due. The custom of the Glasgow banks was to close at twelve o'clock on Saturdays. After the arrival of Gawl, and after the invoices and the cattle had been entered by the defendant in the books, and after M'Kay had been sent to the quay to take charge of the cattle, the plaintiff Boyd handed the £350 (being part of a sum of £400 received by him from Dublin on that morning) to the defendant, asking him to pay the amount of the money order for £250. The defendant took the money—took the notice from the bank, which had been left at the office, intimating that the bank held the order payable on that day; and left the office, saying that he would be back in about ten minutes. Instead of returning, he left Glasgow, without having paid the order; and the plaintiff first learned where he had gone by a telegram from Stirling, intimating that the defendant could no longer remain. The intimation conveyed nothing to attach on the defendant an imputation of dishonesty; and the whole evidence seemed to show that the defendant yielded to timidity, and to an apprehension of the consequences of making advances in the course of business carried on between Dublin

and Glasgow. The defendant afterwards went to Liverpool, on his way to Ireland; but, on reflection, he repented of what he had done, and returned to Glasgow. He endeavoured to repair the consequences of his conduct by an effort, subsequently, to pay the money order; but he had sent to his brother in Ireland the means by which he was enabled to keep and apply the cash credit; and ultimately he left Glasgow. The result was, that the money order was sent back to Dublin as dishonored; that the business of the plaintiffs in Glasgow was suspended; that the Royal Bank withdrew the accommodation which they had been previously in the habit of making to the plaintiffs, to the extent of £1000 in a week; and, according to the evidence of the plaintiff Boyd, that the Dublin business of the plaintiffs was seriously injured by the loss of credit which had thus befallen them; and further, that, by reason of the same cause, they lost the employment of commission agents in Ireland of an Australian mercantile firm, of Martin & Co., which had yielded them a substantial income.

The plaintiff Boyd gave evidence showing, in detail, the losses occasioned, first, in reference to the Glasgow business, in which the defendant was agent; secondly, in reference to their other business in Dublin; and, thirdly, in reference to their commission agency in the employment of Martin & Co. As to this last, Mr. M'Comas, the person representing, in London, the house of Martin & Co., proved that he wrote the letter dismissing the plaintiffs from that commission agency, a few days after the dishonoring of the money order, and in consequence partly, but not solely, of what he had heard of their being in difficulties; he said also that the house of Martin & Co. did not intend to continue their Irish business, or to appoint another Irish agent.

It was admitted at the trial that a breach of the agreement had been committed by the defendant, in absenting himself from Glasgow, and ceasing to perform his duties there; but the defendant's Counsel contended that, as to the non-payment of the money order on the 1st of February, there was no breach of the agreement, because (he insisted) the £350, given to the defendant on that day, was not sufficient to repay his previous advances; and the goods

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which arrived in the steamer were not "in his hands," within the meaning of the contract, before twelve o'clock, when the bank closed, and before which hour therefore it was necessary that the money order for £250 should be paid, if paid at all. He therefore contended that, as the plaintiffs' claim to substantial damages resulted from the loss of credit caused by the dishonoring of the order, and as no specific loss was proved to have resulted from the mere absence of the defendant (Boyd, M'Kay, and Gowl being then in Glasgow), the plaintiff was only entitled to nominal damages, and that I ought so to direct the jury.

It was clear upon the evidence that, if the goods which arrived by the steamer on the 1st of February, were, before twelve o'clock on that day, "in the hands" of the defendant, within the meaning of the contract, those goods, with the £350, were more than sufficient to cover the former advances of the defendant, and the advance to be made out of his cash credit, under the contract, in payment of the money order. If those goods were not then "in his hands," within the meaning of the order, it was equally clear that he was not bound, under the contract, to pay the money order of £250 on the 1st of February.

As to this point, I told the jury that the contract must be considered in reference to the dealings which it contemplated, in which the plaintiffs were to transfer goods, and the defendant was to receive and dispose of them; that the words "in hands" could not be construed literally; and that, if the goods were within the defendant's dominion, so that he could use them, by disposing of them for his security in reference to his advances, they would be "in his hands," within the meaning of this contract; and I told the jury that it was for them to determine whether the meat and cattle, which arrived in Glasgow on the 1st of February, were "in his hands," in the sense in which I so explained the contract, at the time when the money order for £250 should have been paid at the bank on that day, before the bank closed. The jury found that the goods were so within his dominion on the morning of the 1st of February.

During a part of the argument before us, this objection was mentioned, but was not I think relied on at the close. On con-

sideration I retain the opinion that the contract, as to this part of it, plainly meant what the jury were told it imported, and that the question whether they were entitled to give substantial damages upon that view of the contract is closed by their finding.

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The consideration of the case became thus narrowed to that of the amount of the damages. The plaintiff claimed damages under three heads of loss alleged to have been sustained; first—the damage resulting from the suspension and injury of the Glasgow trade; secondly—damages from the loss of the commission agency of the Australian house of Martin & Co.; thirdly—damages from the diminution or loss of the plaintiffs' business in Dublin.

As to all these heads of loss, the plaintiff Boyd gave evidence; and he proved that, in point of fact, losses were sustained as to each, which he complained of in detail, using his books to refresh his memory. By his own statements, and by some other testimony, evidence was given tending to show that, under each head of alleged injury, the damage resulted from the loss of credit occasioned by the dishonor and return of the cash order for £250, which was payable on the 1st of February. As to the first, I told the jury (after commenting on the evidence) that there was evidence that the Glasgow business was of substantial value; and that its continuance, being one of the matters plainly contemplated by the contract, the loss of it, if the jury were of opinion that such loss resulted from the defendant's breach of contract, was a damage sufficiently proximate to be recoverable in this action. As to the second, I asked the jury to tell me, first, whether the loss of the agency of Martin & Co. was caused by the defendant's violation of contract; secondly, whether such loss was the natural result of such violation; thirdly, what was the amount of damages sustained by such loss. I told them that they were not to give damages by reference to future profits; but that they were at liberty to consider the agency as an existing thing, of a certain value (that is, of some value), and to consider what was the value lost by the plaintiffs' being deprived of it. In reference to this, I pointed their attention to the circumstance that Mr. M'Comas (the English agent or partner of Martin & Co.), in his letter to the plaintiffs, announcing that they were to cease to be

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agents in Ireland, and also in his evidence at the trial, stated that no other Irish agent was to be appointed in the plaintiffs' stead; and that they (Martin & Co.) contemplated not continuing their Irish business. At the same time, I told the jury that they were at liberty to consider the agency as a subsisting thing, which was terminated at the time, on the occasion of the derangements of the plaintiffs' business, and that it might have continued, as well as the Irish business of Messrs. Martin & Co., if the plaintiffs had not been removed from it on the occasion of these derangements. As to the third head of alleged loss, I asked the jury to give me similar answers. I told them, as to this, that there was not the same evidence of the loss being caused by the defendant's violation of contract as was supplied in the testimony of Mr. M'Comas; but still that there was evidence of this being a business in actual existence, though they could only give damages in reference to loss down to the bringing of the action; and I left it to them to say whether there was any such loss occasioned by the violation of the contract; and, if so, what was the amount of it.

The jury, in reference to the second and third heads of alleged loss, answered the two first questions in the affirmative; they found, as to the first head of alleged loss, that the plaintiff sustained damage to the extent of £110, of which £65 arose in reference to the beef trade and £45 in reference to the cattle trade. As to the second head, they found damages, in reference to the agency of the Messrs. Martin, to the amount of £120; and as to the third head, they found damages, in reference to the general commission agency of the plaintiffs in Dublin, to the amount of £70; in all, £300. They stated that they found that all these damages, under each head, were the natural result of the defendant's breach of contract.

The defendant's Counsel insisted that each of these heads of alleged damages was too remote; he objected to my leaving them to the consideration of the jury; and insisted, in effect, that I ought to direct the jury that they were too remote; and, further, that I ought to tell them that the plaintiff was entitled only to nominal damages. I refused so to direct the jury; and they found a verdict

accordingly, in conformity with the special findings on the questions submitted to them. I reserved leave to the defendant to move the Court to set aside the assessment of damages, and to enter a verdict for nominal damages, or to strike out any one or more of the sums comprising the £300 from the finding of damages; and thus to reduce the damages, by excluding any one or more of the sums of £65, £45, £120, and £70, as to which I ought to have directed the jury to exclude such sum or sums from their verdict.

The case has been argued upon showing cause against a conditional order, obtained in pursuance of that reservation. In the early part of the argument the defendant's Counsel contended that the first head of damages, viz., that which related to the loss in the Glasgow business, was, according to the authority of *Hadley v. Baxendale* (a) and other cases, too remote. Towards the close of the argument, this head of objection was (in my opinion, very properly) not insisted on at the Bar. Both at the trial and throughout the argument it appeared to me perfectly clear that the claim for damages, as to this head, was within both branches of the rule as comprised in *Hadley v. Baxendale*. They were such as may reasonably be supposed to have been in contemplation of the parties at the time of the contract; for it was to guard against the interruption of the business, by the non-payment of the money orders, that the provision was made by the contract for the cash credit of £500, by means of which the defendant was to pay these orders, when he should have sufficient goods "in his hands;" and the interruption of that business was, as the jury, in my opinion, rightly found, the natural result of the defendant's default in maintaining the credit of the plaintiff, and causing, by the loss of credit immediately resulting from his default, the stoppage of the business which it was the object of the cash credit, and of the application of it in paying the money orders, to maintain, as the means of continuing the trade.

With respect to the other two heads of damages, I entertained some doubt at the trial, and during a part of the argument, whether the rule did not apply to them, which has been applied in many of

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the decided cases, to exclude, for remoteness, loss of profits as the ground of awarding damages, both in actions for breach of contract and in actions for tort. But, on consideration, it appears to me that the present case is not to be ruled by applying those authorities. It appears to me that both the two last heads of claim for damages fall within the principle of the decision in the case of *Rolin v. Steward* (a). There a banker was sued by the plaintiffs, his customers, for dishonoring the plaintiffs' acceptance for £48, and certain cheques drawn by the plaintiffs, the defendant having funds of the plaintiffs in his hands, sufficient to pay the acceptance and the cheques. The amount of the acceptance and cheques together was £111. 14s. There was no allegation of damage in the declaration except the averment that "by means and in consequence of which" said premises, notice of the dishonor of the said bill was given to "the said John Gray, the drawee thereof, and by means and in consequence thereof the plaintiffs were greatly injured in their credit and circumstances, and were suspected by the said John Gray, and other persons who had been and were in the habit of dealing with them in their said business, to be in bad, failing, and insolvent circumstances." The cause of action was proved, as alleged; but no proof was given of special damage. The learned Judge (Lord Campbell), in leaving the case to the jury, told them "that they ought not to limit their verdict to nominal damages, but should give the plaintiffs such substantial damages as they should judge to be a reasonable compensation for the injury they must have sustained from the dishonor of their cheques." The jury returned a verdict for the plaintiffs; damages, £500. An application was made to set aside the verdict, for misdirection, and on the ground that the damages were excessive. The Court were of opinion that the damages were too large; but the plaintiffs, at their instance, consenting to reduce the amount of the verdict to £200, they confirmed the verdict for that amount. Mr. Justice Cresswell, after referring at some length to the judgment of Lord Tenterden in *Marzetti v. Williams* (b), expressed his approval of Lord Campbell's ruling at Nisi Prius, saying, in reference to the

(a) 14 Com. Bench, 595.

(b) 1 B. &amp; Ad. 415.

dishonor of the cheque, that "the jury had a right to assume that "it would be, to some extent, injurious; and if so, it was for them "to say to what extent." Mr. Justice Williams said:—"As to the "alleged misdirection, I think it cannot be denied that, if one who "is not a trader were to bring an action against a banker, for dishonoring a cheque at a time when he had funds of the customer's "in his hands sufficient to meet it, and special damages were alleged, "and proved, the plaintiff would be entitled to recover substantial "damages; and when it is alleged, and proved, that the plaintiff is "a trader, I think it is equally clear that the jury, in estimating the "damages, may take into their consideration the natural and necessary consequences which must result to the plaintiff from the "defendant's breach of contract; just as in the case of an action for "a slander of a person in the way of his trade, or in case of an "imputation of insolvency on a trader, the action lies, without proof "of special damage. I therefore think the direction was right." This decision appears to me to be a direct authority for upholding the verdict in the case now before us. The defendant was bound to pay the plaintiffs' money orders, by a distinct and specific contract, in the events which occurred. The plaintiffs were traders, carrying on business, not in Glasgow only, but also in Dublin. They are described in the contract itself as "of 19 Eden-quay" (which appeared in evidence to be in Dublin), "trading as George W. Boyd and Co., provision merchants, cattle dealers, &c." The defendant therefore had distinct notice that they were engaged in trade. If no evidence had been given of actual damage, the case of *Rolin v. Steward* is an authority for upholding that the jury would have been entitled to give a verdict for substantial damages; and if they would have been entitled so to do when they would have nothing but their own conjectures or inferences to act on in reference to the probable amount of injury, it seems senseless and absurd to say that they are not at liberty to take the real injury, actually proved, into consideration; and to estimate their damages by a standard limited and defined by the evidence before them.

It is difficult to reconcile all the cases which have been determined upon this question of damages being sufficiently proximate, or of

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*Exchequer.* which will determine all cases. Notwithstanding what has been said  
 BOYD of the proposition laid down in *Hadley v. Baxendale* (a), I entirely  
 v. concur in what seems to have been the opinion of Mr. Justice  
 FITT. Crampton in *Smeed v. Foord* (b), and of Mr. Baron Wilde in *Gee*  
*v. The Lancashire and Yorkshire Railway Company* (c), that the  
 rule professed to be laid down in *Hadley v. Baxendale* "is not  
 capable of meeting all cases." I may observe, that *Gee v. The*  
*Lancashire and Yorkshire Railway Company*, which was cited for  
 the defendant in the argument before us, is rather an authority in  
 support of the verdict in the present case; for the Court there,  
 while they held that the Judge was wrong in directing the jury that  
 certain losses ought to be included in their estimate of damages,  
 rested their judgment expressly on the ground that the Judge had  
 so directed the jury *as a matter of law*, and had not left it to the  
 jury to determine whether the stoppage of the plaintiff's mill (the  
 damage resulting from which he directed the jury to find) "*was the*  
*natural consequence* of the non-delivery of the goods." Here the  
 jury have found that the damages, sustained under each head of  
 loss for which the damages were awarded, were the natural conse-  
 quence of the defendant's breach of contract. If we were of opinion  
 that the effect was so remotely connected with the cause, that the  
 question ought not to have been submitted to the jury, we should, of  
 course, not uphold the verdict as it stands; but, I own, I should  
 require satisfactory reasons to induce me to act against the opinion  
 of a jury on such a question as this; and it is impossible, I think, to  
 do so in the present case, consistently with the principle of decision  
 applied in *Rolin v. Steward*.

I had at the trial, and throughout the argument, very great  
 doubt as to the head of damages, relating to the loss of the agency  
 of Messrs. Martin & Co. It appeared to me that, on the testimony  
 of Mr. M'Comas, it was very questionable that there was enough  
 so to connect the loss sustained by the removal of the plaintiffs  
 from the Irish agency of the Messrs. Martin, with the dishonoring of

(a) 9 Exch. Rep. 341.

(b) ELL. &amp; ELL. 616.

(c) 6 Hurleston &amp; Norman, 221.

the money order, and the consequent loss of credit, as to show that the loss of the agency was, within the rule as to damages, the natural result of the defendant's breach of contract. It did not appear that the defendant knew of the existence of that agency; and if he did not, the loss of it might be considered as not coming within one branch of the rule in *Hadley v. Baxendale*, and as not being such as might reasonably be supposed to have been in contemplation of the parties at the time of the contract. The jury, however, have found that it was within the other branch of that rule, by finding that the damages under this head were the natural result of the defendant's breach of contract; and I do not see how this case, as to this head of damages, any more than as to the other, of the loss in the Dublin business, can be distinguished from the case of *Rolin v. Stewart*.

In the argument before us, it was objected (as it was objected at the trial), that the letter of Mr. M'Comas, of the 12th of February 1862, ought not to have been received in evidence. This letter conveyed to the plaintiff their dismissal as agents in Ireland for the Messrs. Martin of Australia, whose firm was represented by Mr. M'Comas acting in London. In that letter,\* Mr. M'Comas refers to his having learned of the difficulties of the plaintiffs; and he refers to those matters having been noised about as a reason

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\* "London, February 12, 1862.

"MY DEAR SIR—Your favor of yesterday is to hand I am totally unable to comply with your wish, and have not even a small indorsement by me at present. I am sorry to hear of your difficulties, although I do not clearly understand how they have been caused; those matters have got so much noised about, not only in Scotland, but even here, that I am compelled out of justice to George Martin & Co. (although extremely painful to myself), to request you will from this date cease to be their Irish agent. In coming to this resolution, you will acquit me of any personal illfeeling; it is simply a matter of business; and if you were a relation of my own, it would not make any difference, as it is my duty to not compromise my partners' firm in anywise.

"At the same time, I have no intention of appointing any successors to yourselves; and further, do not wish you to suffer, and would be quite prepared to make you any equitable allowance as to return commission on any business you introduced, although I fear very much the Irish trade will never be worth much.

"Hoping you will yet be able to tide over present complications, believe me, sincerely yours,

"George W. Boyd, Esq."

"THOMAS H. M'COMAS."



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for requesting that the plaintiffs should cease to be the Irish agents of Martin & Co.; at the same time informing them that he had no intention of appointing successors to the plaintiffs. The fact of the dismissal following, after the lapse of a few days, the dishonoring of the money orders, and the consequent loss of credit, and suspension of the plaintiffs' business, coupled with the evidence of Mr. M'Comas, were plainly proveable in evidence with a view to damages, if this head of damages be not (as we think it is not) too remote: and the letter of Mr. M'Comas was the very act of dismissal. If the dismissal had been verbal, what was said on the occasion of it would have been admissible in evidence as part of the *res gestæ*; and it is, in my opinion, perfectly clear, that the contents of the letter, conveying the dismissal, and stating the grounds of it in the very act of the dismissal itself, were legitimate evidence for the consideration of the jury.

We are of opinion that the cause shown against the conditional order must be allowed, and of course with costs.

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KINGSLEY v. HACKETT.\*

Feb. 10, 12.

A summons and plaint which seeks to recover damages for a partial breach of a contract, but shows that the plaintiff is entitled to recover for a breach of the entire contract, will be set aside upon demurrer.

THE first count of the summons and plaint in this case alleged a contract, by the defendant, to sell and deliver one hundred puncheons of whiskey to the plaintiff, to be delivered in such lot or lots, from one puncheon to one hundred puncheons, as the plaintiff should require. The plaintiff averred that all conditions were fulfilled, and all things happened and all times elapsed to entitle him to the delivery of all the whiskey; and that although the defendant, in part performance of the contract, delivered thirty puncheons of

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\* Sittings in Banco after Hilary Term, *coram* FITZGERALD, HUGHES, and DEASY, BB. The LORD CHIEF BARON was absent at Nisi Prius.

whiskey, yet the defendant neglected to deliver the remaining seventy puncheons. H. T. 1863.

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The second count, having stated the contract as in the first count, continued:—"And although the defendant was afterwards required by the plaintiff to deliver to him one other lot of said whiskey, that is to say, one puncheon of said whiskey, yet the defendant, although so required, did not so deliver the said last-mentioned puncheon of said whiskey pursuant to said agreement, but wholly neglected so to do; whereby the plaintiff has been deprived of the profits which would have accrued to him if the said puncheon had been delivered to him pursuant to said contract."

The defendant demurred to the second count. The points of demurrer were:—because that count sued for part of a claim or damage, the whole of which it showed to be recoverable, without showing that the residue of the claim had been satisfied, or that the plaintiff had waived his right in respect of such residue.

*E. M. Kelly* (with whom was *H. E. Chatterton*), in support of the demurrer, cited *Bayley v. Hughes* (a); *Mounson v. Redshaw* (b); *Hunt v. Braines* (c); *Clotworthy's case* (d); *Dickenson v. Harrison* (e); *Blunt v. Evans* (f).

*M. O'Donnell* (with whom was *C. Coates*), in support of the pleadings, cited: *Hamblin v. Hamblin* (g); *M'Carter v. M'Connell* (h); *Ward v. Smith* (i); *Clarke v. Gray* (k); *Miles v. Sherrard* (l); *Stafford v. Beneath* (m); *Dewell v. Saunders* (n); *Duppa v. Mayo* (o).

All the cases cited on the other side are actions for rent. The causes of action may be divided in an action for damages.

(a) Cro. Car. 137.

(e) 4 Mod. 402.

(f) 4 Price, 282.

(g) Nap. C. B. A. 38.

(i) 11 Price, 19.

(l) 8 East, 7.

(n) Cro. Jac. 490.

(b) 1 Saund. Rep. 201.

(d) Cro. Car. 436.

(f) 5 Ir. Com. Law Rep. 371.

(h) Ib. 39.

(k) 6 East, 564.

(m) 10 Mod. 69.

(o) 1 Saund. 286.

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FITZGERALD, B., delivered the judgment of the Court.

This case comes before us on the defendant's demurrer to the second paragraph of the summons and plaint. That paragraph states a contract by the defendant to sell and deliver, and by the plaintiff to purchase and accept, one hundred puncheons of whiskey, at the price of three shillings per gallon, to be delivered by the defendant to the plaintiff in such lot or lots, from one puncheon to one hundred puncheons, as the plaintiff should require. It then avers that all conditions were fulfilled, and all things happened and all times elapsed, to entitle the plaintiff to the delivery of *the whole* of the goods so contracted for. It then states that the defendant, in part performance of the contract, delivered a portion of the goods, viz., thirty puncheons of the whiskey, and *no more*.

It seems to me that had the summons and plaint stopped here, there is so far stated a breach or breaches of the contract, entitling the plaintiff to recover damages for the non-delivery of all the undelivered goods.

Whether the statement of the cause or causes of action, if made with no more certainty or particularity, would not be open to objection in point of form, may be questioned; but even though informally pleaded (if so), they are so stated as that material issues *might* be taken on them sufficient to determine every question on the contract between the plaintiff and defendant.

The paragraph however then proceeds to state, that *afterwards* (that is, after a breach or breaches of the contract exhausting the whole), the defendant was required by the plaintiff to deliver to him one other lot of said whiskey, that is to say, *one* puncheon; yet the defendant, although so required, did not so deliver the *said last mentioned puncheon* pursuant to said agreement, whereby the plaintiff has been deprived of the profits which would have accrued to him if the *said puncheon* had been delivered to him pursuant to the contract.

The question we have to consider appears to me to be this—whether the defendant, being liable to the plaintiff on a breach or breaches of contract as to the whole seventy undelivered puncheons, and that breach or those breaches being wholly unrelieved or dis-

charged, he can under the same contract be made liable for a new set of breaches, as many in number as there were single puncheons undelivered.

If this could be done there would seem to be no end of the liability of the defendant under the contract; for having made the defendant liable on the seventy new breaches, the plaintiff might, without relieving or discharging them, recommence the process with any variety his ingenuity could suggest.

We are of opinion that the demurrer must be allowed.

Demurrer allowed.

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### SLATOR v. BRADY.\*

Feb. 10, 12.

THIS was an action of ejectment on the title, brought by George Warner Slator, for 43 acres of land, situate in the county Longford. The plaintiff claimed under a lease made to him, of the lands in question, together with others, by Alexander H. Slator, upon the 29th of April 1861, at a rent of £500 per annum, for the life of the grantor or twenty-one years. The defendant relied upon a lease made to him of the lands in dispute, in consideration of £40, at the rent of £23 per annum, by Alexander H. Slator, when an infant, upon the 19th of June 1860, and contended that the receipt from the defendant of the rent reserved under that lease, by Alexander H. Slator, after he had attained his full age, amounted to a confirmation of the defendant's lease. A. H. Slator had also

A lease made by an infant is not void, but voidable only, notwithstanding that the rent reserved is not the best obtainable. A lease made by an infant, so reserving a rent, is not avoided by a lease of the same lands, made to a third party by the infant upon his attaining his full age. To avoid a lease made by an infant,

under which the lessee is in possession, upon the lessor attaining twenty-one years of age, some act of notoriety, viz., ejectment, entry, or demand of possession, is requisite. Mere execution of a second lease by the lessor will not divest the estate created by the first lease.

Both leases might stand together, as a lease and a grant of the reversion therein. Two tests, as to what acts of an infant are void, and what voidable.

\* Sittings in Banco after Hilary Term. *Coram* FITZGERALD, HUGHES, and DEASY, BB. The LORD CHIEF BARON was absent at Nisi Prius.

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**BRADY.** "I hereby confirm the within lease to the within-named Bryan Brady." The case came before the Court upon a demurrer by the plaintiff to the defendant's rejoinder. The pleadings will be found set out at length in the judgment of the Court.

*J. W. Carleton and R. Douse*, in support of the demurrer.

A lease made by an infant is void; or, if voidable only, avoided by a lease of the same lands made subsequent to his coming of age.

As to what instruments, made during infancy, are binding: *Zouch v. Parsons* (a); *Allen v. Allen* (b); *Hearle v. Greenbank* (c); *Baylis v. Dineley* (d); *Hunter v. Agnew* (e); *Fisher v. Mowbray* (f).

A fine of £40 was taken by the infant lessor upon the making of the lease of the 19th June 1860; therefore the lease, not being made at the best rent, was not for the benefit of the infant, and is consequently void: *Allen v. Allen*; *Sugden on Powers* (8th ed.), p. 779.

Assuming the lease of June 1860 to be only voidable, it was avoided by the subsequent lease: *Bac. Abr., Infant* (3), 5. The two leases cannot stand together: *Frost v. Wolverston* (g); *Gilbert on Uses*, 3rd ed., p. 103.

*J. Richardson and J. Brooke*, contra.

This case must be governed by the decision of the Court of Queen's Bench in *Slator v. Trimble* (h). That case was identical with this; and the Court held that the first lease was for the benefit of the infant, and was confirmed by Alexander Slator's receipt of the rent thereby reserved, after he had attained his full age.

An infant is bound by his acts, done during infancy, unless he

(a) 3 Burr. 1794.

(b) 2 Dru. & War. 307; S. C., 4 Ir. Eq. Rep. 472.

(c) 3 Atk. 694, 712.

(d) 3 M. & S. 477.

(e) 1 Fox & S. 15.

(f) 8 East, 330.

(g) 1 Str. 94.

(h) 7 Ir. Jur., N. S., 255.

expressly disaffirm them immediately upon his coming of age: H. T. 1863.

*Goode v. Harrison (a)*; *Holmes v. Blogg (b)*.

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*Carleton.* in reply.

*Cur. ad. vult.*

FITZGERALD, B.

This is an action of ejectment, and comes before us on the plaintiff's demurrers to certain rejoinders of the defendant.

To the plaint the defendant pleaded, by way of equitable defence, that by indenture, dated 19th June 1860, one Alexander Henry Slator, being seised in fee, or otherwise well entitled to the lands mentioned in the plaint, did, in consideration of £40, then paid to him by the defendant, and the yearly rent of £23, demise those lands to the defendant, for the life of the lessor or twenty-one years, whichever should last the longest; that the defendant obtained possession and paid the rent, but that the lease was never registered, pursuant to the statutes for the Registry of Deeds in Ireland; that afterwards, and while the lease was subsisting, the same Alexander Henry Slator, by indenture, dated 29th April 1861, demised to the plaintiff, at the yearly rent of £500, the same lands, together with others, for the life of the lessor or twenty-years, whichever should last the longest; that the plaintiff registered that indenture, pursuant to the statutes; that the plaintiff has no other title to the lands in question than under that lease; and that previously, and at the time of the execution of it, he had actual notice of the lease of the 19th June 1860, so made to the defendant.

To this defence the plaintiff replied:—That Alexander Henry Slator was, at the time of executing the indenture of 19th June 1860, an infant under the age of twenty-one years; that he afterwards, on the 27th April 1861, attained his full age, and, after having so attained his full age, he, without having done any act to confirm the alleged indenture of 19th June 1860, did, by the said indenture of the 29th April 1861, grant the lands to the plaintiff.

On this replication, the questions argued before us arise. It was, I think, agreed on both sides that its sufficiency must depend on one

(a) 5 B. & Ald. 147.

(b) 1 B. Moo. 466.

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 BRADY. or other of these two propositions, viz., that the lease of 19th June 1860 was absolutely void, being the act of an infant; or that, being voidable, it was avoided by the mere execution of the deed of 29th April 1861, after the grantor had attained age, and before confirmation of the deed of 19th June 1860.

To the replication the defendant rejoined, first, that, after Alexander Henry Slator attained age, and after his execution of the deed of 29th April 1861, but before the defendant had any notice thereof, the said Alexander Henry Slator accepted from the defendant the sum of £11. 10s., being one half-year's rent, under the lease of 19th June 1860, for the half-year ending on the 1st May 1861, being the gale day after he attained age; and that he thereby confirmed the lease; secondly, more generally, that, after Alexander Henry Slator attained age, and after his execution of the deed of April 1861, but before the defendant had notice thereof, Alexander Henry Slator duly confirmed the lease of 19th June 1860; thirdly, that, after Alexander Henry Slator attained age, and after his execution of the deed of April 1861, but before the defendant had notice thereof, Alexander Henry Slator, by an indorsement, which is set out *in hæc verba* on the lease of the 19th June 1860, duly confirmed that lease.

Those rejoinders have been severally demurred to by the plaintiff.

Assuming the replication to contain a sufficient *prima facie* answer to the defendant's plea, it seems to me that the rejoinders show no sufficient answer to that replication.

If the lease of the 19th of June 1860 was absolutely void, it was, of course, incapable of confirmation; and if, being voidable only, it was avoided by the mere execution of the subsequent deed, before confirmation, no subsequent confirmation could set it up.

The real questions in the case appears therefore to me to arise on the replication, and to be the two questions already mentioned; and as to them, first, I am of opinion that the lease of June 1860 was not absolutely void. Doubtless, some acts of an infant are absolutely void, while some are voidable only. According to some authorities, the criterion of the distinction is this:—If the act *may* be for the benefit of the infant, it is voidable only; if it *cannot be*

for his benefit, it is void. According to others, it is said to be this:—All such gifts, grants, or deeds as do not take effect by the delivery of the infant's hand, are void; but those which do take such effect, are voidable only.

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It is unnecessary to determine which of these is the more correct. By our adopting either, it seems to me the result will be that the act in question here was voidable only.

The deed of June 1860 was a deed taking effect by the delivery of the infant's hand; and it seems quite impossible to say that it *could* not be an act for the benefit of the infant. It is not enough to say that it *might* not. In truth, the only ground on which it was argued that it could not be for the infant's benefit was, that upon the making of it a fine appeared to have been paid, which showed that the rent reserved was not the best. I am not aware of even a shadow of authority for the proposition that the rent reserved, in an infant's lease, must be the best, in order to prevent its being void.

If there be one undisputed proposition as to the acts of an infant it is this, that his leases reserving rent are voidable only, and not void. Whether, if the lease reserve no rent, or a nominal rent merely, it be not void, because then, as it is said, there is *no semblance* of benefit to the infant, has been doubted. But it seems to me that it would be unsettling foundations to hold that the lease of an infant, reserving a rent not nominal, was void, and not voidable only.

Secondly, I am of opinion that the mere execution of the deed of April 1861, before confirmation of the lease of June 1860, did not avoid the lease:—First, the two deeds are not necessarily inconsistent; the second deed may have effect concurrently with the first, and pass the reversion in the lease. The deed has been produced in the argument; it purports to convey the lands common to both instruments, as in the possession of the lessee of 1860; and though it contains a covenant on the part of the grantor, under which he might be called on by the grantee to do any future act necessary to avoid the lease, it contains no declaration expressly avoiding it.

An important distinction between a void and voidable deed of an infant is this, the void, in short, is binding on neither party to it;



H. T. 1863. but the power of rescinding the voidable instrument is in the infant  
*Eschequer.* grantor only ; and unless the mere execution of the deed of April  
SLATOR 1861 would have enabled the defendant to say that the lease of  
v. 1860 was avoided, the mere execution of that instrument cannot, in  
BRADY. my opinion, have that effect.

Now it seems to me that to the defendant insisting that the lease of 1860 was avoided by the deed of 1861, it would be a clear answer that the deeds might well stand together, as a lease and grant of the reversion. C

Secondly, it seems to me that, an estate having passed under the voidable conveyance, and the grantee being in possession thereunder when the infant attained age, the estate could not, on principle, be divested but by some act of notoriety, as ejectment, entry, demand of possession, or the like ; or, at the least, notice.

Here an estate of freehold, though voidable, passed ; and no authority has been cited for the proposition that such an estate can be defeated by a mere chamber instrument between the grantor and a stranger.

If it be said that the bringing of the present ejectment, by the grantee in the second instrument, forms the preface of his title, that would admit that the mere execution of the second instrument did not operate as an avoidance ; and, in that case, the replication would admit of answer, and be answered by the confirmation before ejectment brought, stated in the rejoinder.

We are, I believe, all of opinion that the demurrer must be overruled.

Demurrer overruled.

M. T. 1861.  
*Queen's Bench*

The COMMISSIONERS of CHARITABLE DONATIONS  
 and BEQUESTS for Ireland v. JOHN ARCHBOLD.\*

(*Queen's Bench.*)

Q

Nov. 15, 21.

By a decretal order of the Lord Chancellor, made on the 17th day of June 1861, *In the Matter of the Attorney-General at the relation of the Commissioners of Charitable Donations and Bequests, petitioners, John Archbold and others, respondents*, John Archbold was ordered to invest a sum of £4863. 7s. 9d. in the purchase of Government stock, and to transfer it to the credit of that matter. This order not having been obeyed, a further order, dated the 19th of July 1861, ordered him, in execution of the former order, to pay the sum therein mentioned to the said Commissioners or their attorney, within ten days; and, on the 24th July 1861, the order of the 19th of that month was, under the 7 & 8 Vic., c. 90, registered against John Archbold as a money order, in the office for the registration of judgments. The money was not paid; and a writ of *fi. fa.*, which issued out of the Court of Chancery on the 1st of October 1861, against the goods and chattels of John Archbold, proved ineffectual.

An attachment order, under the Common Law Procedure Act (*Ir.*) 1853, can be obtained only by judgment creditors at Common Law.

On the 20th of July 1861, an order of the Landed Estates Court directed that £1225. 8s. 2d., portion of a larger sum, should be retained in Court, to meet the claim of John Archbold in a matter pending in that Court.

On the 29th of October 1861, Counsel for the Commissioners obtained from HAYES, J., a conditional order, that John Archbold's interest in the sum retained in the Landed Estates Court should stand attached, to answer in part payment of the sum of £4863. 7s. 9d.

\* Before LEFROY, C. J., O'BRIEN and HAYES, JJ.

**M. T. 1861.** *Lawless* (with him *Palles*), on behalf of John Archbold, now *Queen's Bench* showed cause why the order of the 29th of October 1861 should not be made absolute, and further moved the Court to set it aside. **COMMES. OF DONATIONS** Counsel moved upon two grounds; first, that the decree or order of **v.** the Court of Chancery is not a judgment, or of the nature of a judgment, within the meaning of the Common Law Procedure Act 1853, or of any statute which empowers the Court to make an order charging funds in the Landed Estates Court; and, secondly, that there is not any action or suit pending in this Court in which such a charging order can be legally made. This is merely an attempt to make the Court of Queen's Bench ministerial in carrying out the decree of the Court of Chancery. The Common Law Procedure Act 1853, sections 127 to 135 inclusive, extends judgment creditors' remedies by way of execution; but that Act was passed, as appears from the preamble, to regulate the procedure of Courts of Common Law, deals with their procedure exclusively, and does not, in any particular, increase or lessen the rights of creditors in Courts of Equity. A consideration of the sections makes this manifest. Section 127 applies only to cases in which a "verdict or nonsuit" has been obtained in an "action;" and gives certain powers to "the Court" in which the action was brought. "The Court or a Judge" is a phrase which often occurs in these sections and elsewhere in the Act; but, by section 4, "the Court" means only one of the Superior Courts of Common Law, and "Judge" means only a Judge or Baron of *such* Court. Again, section 128 only applies to cases at Common Law; for it speaks of the county in which the "venue shall be laid." Section 129, no doubt, uses the phrase "judgment *or order* of the Court;" but, even if the interpretation section had not confined this to "judgment or order of a Court of *Common* Law," still an attachment order could not be obtained under an "order" of a Court of Equity, or even of a Court of Common Law; because, in section 132, under which alone an attachment order can be granted, the word "order" is entirely omitted in the sense of section 129, and "judgment" only mentioned as entitling a creditor to an attachment order. Sections 129, 130, and 131, extend a creditor's remedies, by way of execu-

tion, in some respects; but, for the foregoing reasons, they apply only to judgment creditors at Common Law; and, although section 131 uses the phrase "Master of the Court," section 4 confines "Master" to the Masters of the Superior Courts of Common Law. Section 132 allows an attachment order to be granted to a person who has obtained a "judgment;" and that that remedy is confined to creditors at Common Law appears from reference to the form No. 7, schedule B, to which that section refers. The form runs thus:—"It *appearing* to the Court that the *plaintiff* hath recovered judgment." The judgment must have been recovered in that very Court. One Court will not issue execution upon a judgment recovered in another Court, for it would not then be able to satisfy itself, by inspection of its own records, that to issue execution would be just; and moreover the attachment order must be intituled in the *action* and *Court*. Like arguments might be drawn from sections 133, 134; and this Act must be construed very strictly, so as not to extend its operation beyond the precise cases to which it was limited by the Legislature: for instance, section 135 gave power to charge funds or moneys standing in the name of the Court of the Commissioners for the Sale of Incumbered Estates. That Court was abolished by the 21 & 22 *Vic.*, c. 72, and the Landed Estates Court put in its place; but so strictly was the Common Law Procedure Act 1853 construed, that a charging order could not be obtained afterwards against funds in the Landed Estates Court: *Sawyer v. Norris* (a): and another Act had to be passed to give that power.

The 3 & 4 *Vic.*, c. 105, enabled Courts of Equity to frame and issue writs of *fi. fa.* for themselves. Such a writ has been issued in this case without effect; and now this Court is called upon to do what no Court has ever done before, namely, to enforce, by this peculiar species of execution called a charging order, the process of another Court. The 3 & 4 *Vic.*, c. 105, placed creditors under decrees or money orders of the Court of Chancery in as advantageous a position for recovering their debts as judgment creditors at law, but did not empower Courts of Law to enforce decrees of Courts of Equity. On the contrary, by giving a process peculiar

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(a) 10 Ir. Com. Law Rep. 168.

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to Courts of Equity, it showed that Courts of Law should not exercise any such jurisdiction. Section 23 cannot apply to this case, because it does not relate to *money*; and, even if it did, would be powerless here, as the Common Law Procedure Act 1853, repealed it, "save as to Courts of Equity." This Court therefore cannot now act under it. The other sections do not make decrees or orders of Courts of Equity "judgments" for *all* purposes, but only for the purposes of that Act; but if the construction put on it by the other side be true, an action at Common Law could be brought on such a decree or order. Such an action could not be sustained: *Carpenter v. Thornton* (a); *Sheshy v. The Professional Life Assurance Company* (b). That decision was prior to the analogous English Act, 1 & 2 Vic., c. 110; but the same principle was affirmed in *Henderson v. Henderson* (c). *Stanford v. Robinson* (d) decided distinctly that writs on decrees or orders of a Court of Equity could not issue out of a Common Law Court. Orders under the English Act are not to *all* purposes equivalent to judgments: *Farmer v. Mottram* (e). Courts of Equity cannot issue charging orders against money. Their powers are shown in *French v. Balfre* (f). If this decree was a judgment to all purposes, it might have been assigned, until the 9 G. 2 (*Ir.*) was repealed by the 12 & 13 Vic., c. 95; but there never was such a thing as a legal assignment of a decree of the Court of Chancery.

*T. Lefroy* and *J. B. Murphy*, in support of the order.

*Farmer v. Mottram* is a decision against Archbold; for though Tindal, C.J., said that "an order of Court is not, by the 1 & 2 "Vic., c. 110, s. 18, made to *all* intents and purposes equivalent to "a judgment," he adds "but only for the purpose of giving the "party a *more efficient remedy*, and of enabling him to rank as a "judgment creditor." The Commissioners seek to employ this decree only so far as is necessary to secure to them a judgment creditor's remedy. Undoubtedly the order of the 29th of October

(a) 3 B. & Ald. 52.

(b) 2 C. B., N. S., 211-256.

(c) 6 Q. B. 288.

(d) 3 C. B. 407.

(e) 7 Scott's N. Rep. 408.

(f) 6 Ir. Chan. Rep. 68.

cannot be made absolute unless Archbold is a "debtor," within the meaning of the 135th section of the Common Law Procedure Act 1853. That Act, so far as it enhanced the remedies by way of execution, must be read in connection with the 3 & 4 *Vic.*, c. 105, and the 12 & 13 *Vic.*, c. 95, which gave new remedies to judgment creditors at Common Law, and placed a person who had obtained a decree or order of the Court of Chancery in the same position (so far as was necessary to enforce them) as a judgment creditor at Common Law. The phrase "Court or a Judge," in the 3 & 4 *Vic.*, c. 105, s. 23, does not mean that the remedial power thereby given is to be exercised only by the particular Court in which the action, wherein the judgment was obtained, was brought, or by a Judge of that Court. It means that *any* one of the Superior Courts, or a Judge of *any* such Court, may exercise the power in respect of *any* judgment; for such are the words of the section. The Courts were given mutual powers. That very section, in terms, enables the Court of Chancery to aid persons who have obtained judgments at Common Law; and there is nothing in the Act inconsistent with the exercise, by Courts of Law, of a like power, in favor of persons who had got a decree or order of the Court of Chancery. The Common Law Procedure Act 1853, section 135, only extended that remedy for judgment creditors, by enabling the Courts to make an order against funds in the Incumbered Estates Court. The 3 & 4 *Vic.*, c. 105, s. 27, enacts "that all decrees and orders of the Court of Chancery, . . . whereby any sum of money . . . shall be payable to any person, shall have *the effect* of judgments in the Superior Courts of Common Law." That effect was, by the previous sections, to entitle those judgment creditors to the new remedies; and these words would have no meaning unless they give the same new remedies to persons having a decree or order of the Court of Chancery. "And the persons to whom any such moneys . . . shall be payable, shall be deemed judgment creditors, within the meaning of this Act." These words make persons having such decrees or orders judgment creditors at common law, for all the remedies given by that Act. The same section says:—"And all remedies *hereby*

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 COMMRS. OF "to whom any moneys . . . . are, by such orders, . . . .  
 DONATIONS "directed to be paid." Therefore under that Act the Commis-  
 v. sioners, having a decree of a Court of Chancery, would be entitled  
 ARCHBOLD. to *every* remedy attainable by a judgment creditor ; and one of those  
 remedies would be, to have his decree or order enforced by a Court  
 of Common Law. But the words "*hereby given*" preclude them  
 from obtaining any remedies other than those specified in that Act.  
 But the 12 & 13 Vic., c. 95, s. 7, omits the words "*hereby given* ;"  
 and, in the most general terms, enacts that "all decrees and orders  
 "of the Court of Chancery, . . . . to which the effect of  
 "judgments in the Superior Courts of Common Law was given by  
 "the 3 & 4 Vic., c. 105, shall," where subject to the 12 & 13 Vic.,  
 c. 95, "have the effect of judgments, subject to the provisions of  
 "this Act, recovered in the Superior Courts of Common Law ; and  
 "the persons to whom any moneys . . . . are, by such decrees  
 "or orders, directed to be paid, shall have the remedies to which  
 "judgment creditors under such judgments will have and be en-  
 "titled to." That enactment abolishes the limitation contained in  
 the previous Act, and extends to persons having decrees all remedies  
 which judgment creditors are thereby given, or shall thereafter  
 obtain. The question therefore is, what is the meaning of the  
 words "such debtor," in the Common Law Procedure Act 1853,  
 s. 135 ? That meaning must be ascertained from the foregoing  
 sections. "Such debtor" means the person against whom execu-  
 tion may issue under those sections. Section 128 deals with "*any*  
 writ of execution," not "any *Common Law* writ of execution ;"  
 and these writs may, under section 129, issue for the sum adjudged  
 by the "judgment *or order*" of the Court. When the Commis-  
 sioners show that a *fi. fa.* has issued ineffectually against Archbold,  
 this Court cannot inquire out of what Court that writ issued, but  
 must grant the charging order as the most efficient remedy : for, if  
 that writ has issued from a Court of Law, at the suit of a judgment  
 creditor, the charging order cannot be refused ; and it is submitted,  
 for the reasons given, that a person having a decree or money order  
 of the Court of Chancery is entitled to all the new remedies

acquired at Common Law. The records of the Court have been searched, and orders precisely similar have been made absolute, though it does not appear that any cause was shown against them.

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*Palles*, in reply.

The 3 & 4 *Vic.*, c. 105, s. 23, did not confer mutual powers on Courts of Law and Equity; but, even if it had, it dealt with *judgments* only. To effect the Commissioners' purpose, they must make decrees or orders of the Court of Chancery part of the subject-matter with which section 23 dealt. That can be done only by incorporating with it section 27. These two sections cannot be read together for their benefit unless they are also read together against them; and then section 27 expressly contains a restriction that the party shall apply only to a Court of Equity "with respect to matters therein depending;" so that a Court of Law cannot carry out the remedy to enforce a decree in Equity. But it was contended that the 12 & 13 *Vic.*, c. 95, placed a creditor by decree in Equity in exactly the same position as a judgment creditor at Common Law, not only with respect to remedies then existing, but also as to remedies to be given by any subsequent Act; and that therefore the Commissioners have a right to obtain in this case a charging order under the Common Law Procedure Act 1853. But the 12 & 13 *Vic.*, c. 95, dealt only with a peculiar class of judgments, and decrees or orders in respect to which Parliament thought that the existing remedies were too ample; and, in section 7, cut down, instead of extending, the existing remedies in these cases, and limited persons to the remedies given by that Act. That section does not amount to a statutable contract between Parliament and creditors under decrees, to give them every remedy which is given to judgment creditors; so that, even if this decree be part of the subject-matter dealt with there, yet the extended remedies, under the Common Law Procedure Act 1853, are not necessarily given to creditors under decrees. The words in the 4th, 5th, and 7th sections, "subject to the provisions of this Act," refer only to judgments for sums under £150. Section 4 shows that; because it gives a remedy by way of *elegit*. In respect to what judgments?



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Not of judgments generally; for the previous part of the Act had left that remedy existing as to all judgments above £150; and it would be absurd to suppose that the Act gave an *elegit* against *half* the lands, to persons who already had that remedy against the *whole* of them. Counsel then argued that this decree was not within the 12 & 13 *Vic.*, c. 95, because the Common Law Procedure Act 1853 dealt only with the procedure of Courts of Common Law, and relied particularly on the fact that it repeals, "save as to Courts of Equity," the 4 & 5 *Vic.*, c. 105, s. 20. The 131st section, Common Law Procedure Act 1853, is almost a transcript of that section; and it would have been absurd to repeal a section "save as to Courts of Equity," and then, in the same Act, re-enact it as to Courts of Equity as well as Courts of Law. It is therefore submitted first, that, under the 3 & 4 *Vic.*, c. 105, creditors under decrees or orders in Equity could not enforce them, except by writs issuing out of the Court of Chancery; secondly, the parties could only obtain the very remedies given by that Act, among which that now sought is not to be found; thirdly, the 12 & 13 *Vic.*, c. 95, did not extend these remedies with respect to such a decree as this; and, fourthly, if it did extend them, the Court of Chancery, and no other Court, can enforce its own decrees.

*Cur. ad. vult.*

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LEFROY, C. J.

Nov. 21.

This case comes before us by way of appeal from a conditional order made by my Brother HAYES, to attach a certain fund in the Landed Estates Court, to answer a money order made by the Court of Chancery, against John Archbold, for a sum which was decreed to be paid by him to the Commissioners. The charging order was made by my Brother HAYES for the purpose of obtaining a decision on the question which now arises in this case for the first time; for, so far as we have been able to discover, there is no decision on the question. It therefore imports us to consider the several Acts of Parliament that have been passed for the purpose of giving to creditors a more effectual remedy for the recovery of their debts, by way of execution against funds which theretofore were not the

subject-matters of execution, The case involves also the consideration of the additional remedies which were provided for creditors in Courts which had not theretofore possessed any species of execution which would enable them to reach either the funds, which formerly were at all times the subjects of execution under writs of *fi. fa.*, or the additional funds, that were by the late Act made the subjects of execution.

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By what is called Pigot's Act (3 & 4 Vic., c. 105), property which had not theretofore been the subject of execution, was brought within the scope of an execution by writs of *fi. fa.* Theretofore property, consisting of moneys, could alone be taken in execution under a writ of *fi. fa.* But a party might have a right to money, or to other species of property representing money, as stock, or his money might be in the hands of trustees, or he might be the proprietor of property represented by shares in public companies; but such property could not be reached by an execution. There was another defect with respect to the power of creditors to enforce their demands, when those demands arose in a Court of Equity. A Court of Equity had no authority to issue execution. These defects in the law were, to a certain extent, remedied by Pigot's Act, by which those species of property to which I have alluded were made the subjects of execution; and by which, furthermore, Courts of Equity were given authority to enforce, by way of execution, their decrees for the payment of money. Under that Act, a Court of Equity might frame writs of *fi. fa.*, or the other species of executions to which a judgment creditor at Common Law had a right; and accordingly those Courts did frame forms of writs of execution, for the purpose of carrying out their own decrees. Things remained in that state, when, I suppose encouraged by the useful results of those alterations in the law, a further progress was made with respect to matters which might be made the subjects of executions; and accordingly, by the Common Law Procedure Act 1853 (16 and 17 Vic., c. 113), the remedy by way of execution was extended to other species of property. Under that Act, a person who had obtained at law a judgment or an order for the payment of money to himself was liable to have that right attached by a charging

**M. T. 1861.** order, as it was called, made against property of that description.  
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**DONATIONS** Common Law, or money standing in a Court of Equity, might be  
**v.** arrived at by a charging order. But that jurisdiction was given for  
**ARCHBOLD.** the first time by the Common Law Procedure Act 1853. But before  
 I proceed to consider that statute, I should observe that every  
 remedy which a judgment creditor had at Common Law had been  
 given by Pigot's Act to creditors under decrees of a Court of  
 Equity; or, in other words, a creditor under a decree of a Court of  
 Equity was put on the footing of a judgment creditor at Common  
 Law; so far however (and these are important words to attend to)  
 as the remedial action was concerned, it was to exist for creditors  
 under a decree of a Court of Equity, only for the purposes of  
 that Act.

It might therefore well have been expected that the Legislature,  
 when, by the Common Law Procedure Act 1853, it further enlarged  
 the remedies of a judgment creditor at Common Law, would also  
 have equally enlarged that same species of remedy on behalf of a  
 creditor under a decree of a Court of Equity. This expectation  
 might have been entertained as to the course which legislation was  
 likely to take; and was an expectation so reasonable that, if the  
 Common Law Procedure Act 1853 contained very slight indications  
 of that intention, or if, on a fair interpretation of the language of  
 that Act, it could be inferred to have been the intention of the  
 Legislature that the increased remedies should embrace a creditor  
 under a decree of a Court of Equity, it would have been the duty  
 of this Court to endeavour to work out that intention. However,  
 upon a careful examination of its provisions, it is utterly impossible,  
 consistently with the language of the several sections which have  
 followed one another in succession, to carry further the advanced  
 remedies in favor of creditors under decrees of a Court of Equity.  
 That object cannot be attained, consistently with any fair, substan-  
 tial, and solid interpretation of the language of these sections. It is  
 to be regretted that, either from a want of full consideration, or  
 from the language of the Act being what it is, that result cannot be  
 attained; but the effect of the Act plainly is no more than to give

to a judgment creditor at Common Law these advanced remedies. Now, the demand upon which the Commissioners have sued is a demand under a money order of the Court of Chancery, against Archbold, who is ordered thereby to pay them a sum of money. A writ of *fi. fa.* issued out of that Court, without effect. They went as far as the law allowed them to go by the use of their own process. All that remained for them to do was to try and attach the money in the Landed Estates Court. But the terms of the Common Law Procedure Act 1853 do not allow a party, under a money order of the Court of Chancery, to avail himself of those remedies which, upon the sound interpretation of the Act, must be confined to judgment creditors at Common Law. I do not go minutely into the several sections which demonstrate this: they have been all before the Court, and we have considered them, and found that we cannot give effect to them, so as to redress the mischief to which, from want of a remedy, the Commissioners must now remain subject.

We must therefore allow the cause shown, and discharge the order of the 29th of October 1861.

O'BRIEN, J.

I am also of opinion that the conditional order obtained by the Commissioners should be discharged. That was an order attaching defendant's interest in a sum of £1225 cash, standing in the name of the Accountant-General of the Landed Estates Court, for part payment of a sum of £4863, which by an order of the Court of Chancery, in the *Attorney-General v. Archbold*, was directed to be paid by the defendant to the Commissioners. It appears that my Brother HAYES, when granting the conditional order, expressed his opinion against the claim made by the Commissioners. They rely on the 135th section of the Common Law Procedure Act 1853; but I am clearly of opinion that the power given to a Court of Common Law by that section, of attaching a party's interest in money in Court, for payment of a debt due by that party, is confined to cases where the debt is secured by a judgment obtained against such party, and does not extend to cases like the present, where the debt is due only under an order or decree of the Court

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of Chancery. The words "such debtor" in the beginning of the 135th section, confining its subsequent provisions to the class of debtors thereby designated, clearly refer to the class of debtors mentioned in the three preceding sections (132 to 134), which expressly deal only with the case of debtors against whom judgments shall have been entered; and the subsequent part of section 135, in empowering Courts of Common Law to make any order with respect to a debtor's interest in money in Court, gives them only power to make the same order as they might make with respect to stocks, funds, &c., standing in the name of a trustee for "such judgment debtor;" clearly showing that the debtors dealt with by that section are only debtors by judgment. This view is further confirmed by the language of the 132nd section, which gives the power of attaching a party's interest in stock, standing in his own name or in that of a trustee for him, and which in its terms is confined to the case of parties against whom judgments shall have been entered, and does not give such power of attachment except for the recovery of debts secured by judgments.

It has been urged that it would be in accordance with the policy and intention of the Legislature to extend the remedies given by that Act, for the recovery of judgment debts, to the recovery of moneys due on orders or decrees of a Court. There is however nothing in the Act from which such an intention can be inferred: it is on the contrary to be observed that in the 129th section the power of issuing executions is expressly given in the case of debts due on orders of the Court (meaning thereby, according to the interpretation clause, orders of one of the Superior Courts of Common Law), as well as in the case of debts secured by judgments: and when we find that in the subsequent sections, giving the remedy by attachment to debts due on judgments, no mention whatever is made of debts due on orders of the Court, the clear inference is, that though the Legislature gave to these latter debts the remedy by execution, it did not intend to give them the remedy by attachment of the debtor's interest in stock or cash, which is given by those subsequent sections for the recovery of judgment debts.

It has however been contended by Mr. *Lefroy*, that the provisions of the Act of 1840 (3 & 4 *Vic.*, c. 105), and of the Act of 1849 (12 & 13 *Vic.*, c. 95), with respect to decrees or orders for payment of money, should be considered as incorporated with, and as regulating the construction of the sections of the Common Law Procedure Act of 1853, already referred to. The 23rd section of the Act of 1840 gave to a judgment creditor a remedy (which he did not previously possess) for recovering his debt out of any stock, shares, &c., standing in the name of the debtor or in the name of anyone in trust for him; but did not give him any such remedy against the debtor's interest in cash standing in the name of the Accountant-General, &c. That section (save so far as relates to the jurisdiction of a Court of Equity) has been repealed by the Common Law Procedure Act of 1853, which gives the judgment creditor more extensive remedies, not merely against his debtor's interest in stock, shares, &c., but also against his interest in cash standing in the name of the Accountant-General, &c.; but the section of the Act of 1840, chiefly relied on by Mr. *Lefroy*, is the 27th section (which has not been repealed), and which provided that all orders or decrees of the Court of Chancery, and orders of the Superior Courts of Common Law for payment of moneys, should have the effect of judgments of the Superior Courts of Common Law, and that the parties to whom such moneys should be payable should be deemed judgment creditors within the meaning of said Act; and that all remedies given by said Act to judgment creditors should be also given to the parties to whom such moneys were payable. I am however of opinion that this section should be construed as confined to the remedies given by that Act to judgment creditors; and that creditors under decrees or orders were thereby put upon the same footing as judgment creditors, not for all purposes whatever, but only for the purposes of said Act, and so far as related to the remedies thereby given to judgment creditors; and that the section cannot be relied on as giving to such decrees or orders the effect of judgments for other purposes not within the Act, and as absolutely entitling the creditors under such decrees or

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**M. T. 1861.** orders to all other remedies which might by any subsequent Act  
*Queen's Bench* be given for the recovery of judgment debts expressly, without  
**COMMRS. OF** any reference to moneys due under decrees or orders. With respect  
**DONATIONS** to the 7th section of the Act of 1849 (12 & 13 *Vic.*, c. 95), which  
**v.** has been also relied on by Mr. *Lefroy*, as giving, to creditors by  
**ARCHBOLD.** decrees and orders, all the remedies of judgment creditors, it is  
to be observed that this section in its terms deals only with that  
class of decrees and orders which are defined to be "decrees or  
orders subject to the provisions of said Act;" and that by the  
preceding 2nd section this definition appears to include only such  
decrees or orders as should be obtained after the Act, for sums less  
than £150. This 7th section therefore does not relate to decrees  
or orders obtained for a greater sum, and could not in any event  
be relied on as entitling creditors under them to the remedies of  
judgment creditors. I am therefore of opinion that, notwithstanding  
the Acts of 1840 and 1849, the remedy given by the 135th section  
of the Act of 1853, for attaching a debtor's interest in cash standing  
in the name of the Accountant-General, &c., is confined to the case  
of debts due on judgments, and does not extend to the case of debts  
due under decrees or orders. I may further observe, with respect  
to the case now before us, where the debt is due under an order of the  
Court of Chancery, that it has been admitted during the argument  
that that Court would have no power to grant the relief now sought;  
and it would be a singular result of the Act of 1853, if a Court of  
Common Law acquired thereby greater power to enforce an order  
of the Court of Chancery than that Court itself possessed.

HAYES, J.

When the attachment motion was made before me in Chamber, I  
told Mr. *Lefroy* that I entertained very considerable doubts of his  
right to the order; but as it was pressed on me that irreparable  
mischief might be done if I refused it, I thought it best to surrender  
my own opinion. Further discussion has only served to confirm  
my first impression. The short reasons upon which I rest m.  
opinion are these:—The 3 & 4 *Vic.*, c. 105, s. 27, enacted that a  
decrees of the Court of Chancery, and money orders, should have

the effect of judgments in the Superior Courts of Common Law, so as to be (*inter alia*) an actual charge on the debtor's land; and that the persons to whom the same should be payable should be deemed judgment creditors, "*within the meaning of that Act.*" Having given to the Courts of Equity, with respect to their decrees and money orders, all the powers and remedies of a Court of Common Law with respect to judgments, the statute proceeds, in the 29th section, specially to authorise Courts of Equity to frame and issue new writs of execution; so that, by the combined operation of that and the 23rd section, the suitor might have complete justice done him in the Court of Equity in which he had obtained his decree or money order. So things stood until the passing of the Common Law Procedure Act 1853, the object of which was the improvement of procedure in the Courts of Common Law; but that Act did not in anywise interfere with, affect, or come in aid of, the powers and jurisdiction of a Court of Equity. Affecting to deal only with the party entitled or subject to execution in a Court of Common Law, it proceeds to give to judgment creditors, properly so called, several remedies by way of execution. These are set forth in sections 127 to 135; and I find no words in those sections which would authorise us in imparting to creditors of the Court of Chancery, by decree or money order, benefits which, in my opinion, were intended only for the creditor by judgment. In fact, the Legislature seems to have excluded all that, and to have left the Courts of Equity precisely as they had been left by Pigot's Act. Accordingly, when enumerating the sections of that Act which it intends to repeal, the words "*save as to Courts of Equity*" are inserted. That expression seems very pregnant, to show that Courts of Equity were entirely excluded from the operation of the Procedure Act, and were left with the powers previously given them, to execute their own decrees and orders. Not being able to give to the word "judgment," as used in the Common Law Procedure Act 1853, the interpretation of "judgment, decree, or money order of the Court of Chancery," I am of opinion that this attachment order cannot be sustained, and that the cause shown must be allowed.

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FITZGERALD, J.

Being myself one of the Commissioners of Charitable Donations and Bequests for Ireland, I was not present during the argument of this case; and of course do not take any part in the judgment of the Court.

Cause shown allowed.

KAVANAGH v. THE COAL MINING COMPANY  
OF IRELAND (Limited).\*

Nov. 19, 21.

A lease, dated June 1848, and made in pursuance of an agreement of 1802, demised certain premises, "with the rights, members, and appurtenances thereunto belonging or in anywise appertaining."

Evidence was given of the enjoyment of a right of way, by the occupiers of the demised premises, over the premises of the lessor, under whom the defendants claimed, for more than forty years before action brought; and that the right of way in question was essential to the enjoyment of the demised premises.

*Held*, that there was no unity of possession of the dominant and servient tenements in the lessor, upon the grant of the lease of 1848, sufficient to extinguish the right of way.

*Held also*, that the right of way, being essential to the beneficial enjoyment of the demised premises, passed under the word appurtenances.

THIS was an action for the disturbance of a right of way. The plaintiff contained eight paragraphs. The first paragraph stated that before and at the time, &c., a certain messuage, situate in the town of Athy, in the county of Kildare, was, and still is, in the possession and occupation of one William Kennedy, as tenant thereof to the plaintiff, the reversion thereof then and still belonging to the plaintiff; and the plaintiff says that he and his tenants, occupiers of the said messuage, were entitled to a right of way from said messuage over, through, and along a certain private road in the town of Athy aforesaid, adjacent to the said messuage, unto the banks of a certain public navigable canal in the town of Athy aforesaid, called the Grand Canal, at one end of the said private road, and back again, &c.; and the plaintiff says that whilst the said messuage was so in the possession and occupation of the said William Kennedy, &c., and whilst he, the plaintiff, was so interested in the premises as aforesaid, the defendants wrongfully obstructed, &c. In the other

\* Before the Full Court.

paragraphs of the plaint, the nature of the plaintiff's right, and the mode of obstruction, were variously stated. The defences were traverses of the several rights of way, as alleged. Issues thereon. The case was tried at the Naas Summer Assizes 1861, before the Right Hon. the LORD CHIEF JUSTICE. It appeared that in the year 1802, one Robert Rawson entered into possession of the premises in respect of which the right of way was claimed, under an agreement for a lease for ninety-nine years, from the Grand Canal Company, and continued in possession thereof until the year 1848, when he conveyed all his interest in the said premises, under that agreement, to one James Goodwin; and on the 14th June in the same year, the Grand Canal Company, in pursuance of the said agreement, executed to Goodwin a lease of the said premises, for the then residue of a term of ninety-nine years, from the 29th September 1802, and Robert Rawson joined in the execution of that deed. It also appeared that, by an indenture of the 30th August 1848, Goodwin assigned to James Sadleir, manager of the Tipperary Bank, the premises demised by the lease of the 14th June 1848, for the residue of the term thereby created; and that, by a further deed, of the 8th September 1856, George M'Dowell, the official manager, assigned the same premises to the plaintiff. The plaintiff read in evidence the lease of the 14th June 1848, which was made between the Company of Undertakers of the Grand Canal of the first part, Robert Rawson of the second part, and James Goodwin of the third part, whereby the said Company demised to the said James Goodwin "all that and those that piece or parcel of ground, with the "storehouse built thereon and yard behind the same, containing, "&c., bounded on the north by the Grand Canal Company's yard, "now in the possession, &c., *on the south by a road leading to the "canal, on the east by Shrew-lane, and on the west by said "canal; which said premises are more particularly delineated and "described in and by the map thereof drawn on the margin of these "presents: to have and to hold the said demised premises, with the "rights, members, and appurtenances thereunto belonging or in "anywise appertaining, unto the said James Goodwin, his executors, administrators and assigns, for and during the residue of the*

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"term of ninety-nine years, to be computed from the 29th day of September 1802." The southern boundary of the demised premises, which was described as a road in the lease, was also marked as a road on the map drawn on its margin, and was the place over which the right of way was claimed. The plaintiff gave evidence to the following effect:—That he had been in occupation of the demised premises for about twelve years, and before the assignment from M'Dowell to him; that he had used those premises as a store; that there were two doors opening from the store on the defendants' premises (over which the right of way was claimed) at the time he went into occupation; that he had used the latter premises as a passage from those doors, and also from a door of the store opening in Shrew-lane, for the purpose of carrying corn to the canal; that about nine years before the commencement of the action he had closed up one of those doors permanently, and about six years before the same date he had closed up the other in a temporary manner; that, in May 1860, the defendants shut up the said passage, by building walls across it, both in front and re-re, which was the obstruction complained of; and that they had, since that time, used those premises as a yard. Evidence was also given, on behalf of the plaintiff, by a witness, who had resided in the town of Athy for sixty years, that he had known the plaintiff's premises for upwards of forty years; that his father was agent to the person who was then in occupation, and that the premises were then used as a store; that there was no other way to the store except by the road in question; and that, if the road were closed up, it would be the annihilation of the store. At the close of the plaintiff's case, a suggestion was thrown out by the learned CHIEF JUSTICE, that the evidence seemed to be of a public right of way; but as the plaintiff did not press for an amendment, the pleadings and issues were left unaltered. The defendants read in evidence a lease from the Grand Canal Company to the defendants, of the premises over which the right of way was claimed. It was admitted that, at the time of the execution of the lease of 1848, the Grand Canal Company were seised in fee and were in possession of the defend-

ants' premises, and that they were also seized in fee of the plaintiff's premises, subject to the agreement of 1802.

By consent of both parties, the learned CHIEF JUSTICE directed a verdict to be entered for the plaintiff, to be turned into a verdict for the defendants if the Court above should be of opinion that the evidence was not sufficient to entitle the plaintiff to a prescriptive right of way over the defendants' premises.

A conditional order having been obtained on a previous day in this Term, that the verdict had for the plaintiff should be set aside, and a verdict entered for the defendants, pursuant to the leave reserved; or that the verdict should be set aside, and a new trial had, on the ground of the same being against evidence and the weight of evidence—

*T. White* and *Byrne* now showed cause.

*G. Battersby* and *J. T. Ball*, in support of the conditional order.

*T. White.*

The lease of 1848 describes the demised premises as bounded on the south by a road leading to the canal, and on the map on the margin of that lease the southern boundary is also marked as a road. It is admitted that the plaintiff can take nothing except what passed by that lease. That instrument demised the premises "together with the rights, members and appurtenances thereunto belonging or in anywise appertaining;" and it is submitted that at the date of the lease the right of way in question was legally appurtenant to the premises. There was positive evidence of a user of the *locus in quo* as a road by the occupiers of the demised premises for over forty years, and the jury were therefore at liberty to presume its existence prior to 1802. There was no evidence that the demised premises were ever in the possession of the Canal Company; there could therefore have been no unity of possession such as would have extinguished the right of way. At the date of the lease there was at law nothing but a tenancy from year to year, and the effect of the lease was either to enlarge that tenancy, or to work a surrender of it. In either case the Grand Canal Company could have had

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M. T. 1861. nothing more than a momentary seisin of the demised premises. If this right were appurtenant at the date of the lease it would have passed: *Fentiman v. Smith* (a); *Hill v. Grange* (b); *Morris v. Edgington* (c); *Hinchcliffe v. Kinnoul* (d).

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The closing of the doors could only have amounted to an intermission of the user of the road. The distinction between an intermission and an interruption of user is pointed out in *Carr v. Foster* (e). It cannot be contended that there was any interruption of this right by the Canal Company, within the meaning of the 4th section of the Prescription Act. He cited also *Bower v. Hill* (f); *Dobbyn v. Somers* (g).

*G. Battersby* and *J. T. Ball*, in support of the conditional order.

The fact of the *locus in quo* having been described as a road in the lease amounts only to a *falsa demonstratio*. If the lease had demised the premises "as then in the possession of ———," or "as then belonging to ———," it is admitted that the right would have passed. The term "appurtenant" has a strictly legal meaning; and the question is, whether at the date of the lease this right of way was strictly appurtenant to the demised premises.

The lease of 1848 operated as a surrender of the former yearly tenancy, and consequently there was, on the execution of that lease, a unity of seisin in the Canal Company sufficient to extinguish the right: *Whaley v. Thompson* (h). See observations of Tindal, C. J., in *James v. Plant* (i). They cited *Worthington v. Gimson* (k), and *Buckby v. Coles* (l).

*Byrne*, in reply, cited *Glave v. Harding* (m); *Ewart v. Cochran* (n).

(a) 4 East, 107.

(c) 3 Taunt. 23.

(e) 3 Q. B. 581.

(g) 13 Ir. Com. Law Rep. 293.

(i) 4 Ad. & Ell. 761.

(l) 5 Taunt. 311.

(b) 1 Plow. 164.

(d) 5 Bing., N. C., 1.

(f) 1 Bing., N. C., 549.

(h) 1 Bos. & Pull. 371.

(k) 29 L. J., Q. B., 116.

(m) 27 L. J., Exch., 286.

(n) 7 Jur., N. S., 925.

LEPROY, C. J.

This case comes before the Court upon a question reserved at the trial by the consent of the parties to the action, who agreed that a verdict should be entered for the plaintiff, to be turned into a verdict for the defendants if the Court above should be of opinion that there was no evidence to entitle the plaintiff to a prescriptive right of way; or that the verdict be set aside and a new trial had, on the ground that the verdict was against evidence and the weight of evidence. The action was brought against the Coal Mining Company for the disturbance of a private right of way, claimed by the plaintiff under a lease made by the Grand Canal Company in 1848, of a storehouse and premises on the bank of the canal, in the town of Athy. At the time of the demise, the storehouse had two doors opening on a road which was described in the lease as leading to the canal, and bounding the lot demised on the south side. That road led from the town of Athy. The use of that way was essential to the enjoyment of the premises, of which it was one of the boundaries; and, if the road were stopped up, the concern would in fact be, as one of the witnesses said, of no use. The defendants however, who are tenants to the Canal Company, of the premises adjoining the plaintiff's storehouse, thought fit lately to occupy this road, and stop up the passage which, at the time of the demise, was described as one of the boundaries of the plaintiff's concern. The defendants thought fit to make use of it by building on it, or in some other way; in short they deprived the plaintiff of the benefit of his contract. It appears that, in the year 1802, a contract was entered into by a party (of whose interest the plaintiff is assignee), with the same Canal Company, for a lease of these premises, and that party enjoyed them under that contract down to the year 1848. The legal operation of that contract was to create a tenancy from year to year; but that tenancy from year to year continued without interruption; and, during the whole time of its continuance, the storehouse was occupied with the two doors in use, except that, some years ago, both of the doors were stopped up, but one of them only in a temporary manner, so as to show clearly the intention of the occupier to have

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recourse to it again. Perhaps however it was unnecessary for me to advert to that circumstance, because no question was raised at the trial with respect to an abandonment or relinquishment of the right; and therefore, though I advert to it, I do not consider it of importance, as it was not made available in any way, and I only mention it as a fact in the case. However, in 1848, the present plaintiff, with the consent of the party who, in 1802, had entered into the contract for the lease, and had, from that year and under that contract, enjoyed these premises, with the storehouse and right of way, and who now joined in the lease, obtained from the Canal Company the lease in question, which demised the concern exactly as it was described in the contract of 1802 as bounded by this road on the south side, and demised it, moreover, with all its rights, members and appurtenances. There was a map attached to the lease; and the circumstances under which the lease was made in pursuance of the contract of 1802, as well as the continuous enjoyment under that contract, were all in evidence. It is contended that, notwithstanding the lease and the subsequent enjoyment of the way until the late interruption of it, this right of way could not pass under the word "appurtenances." It may be conceded that, according to its strict legal acceptance, the word "appurtenances" would not carry the right of way. But, on the other hand, there is no doubt now on the authorities that this term "appurtenances," though not applicable, properly speaking, except to things attached to other things and adhering to them, such as, for instance, a right of common appurtenant to land, though these are the things primarily calculated to pass under that term and are things incidental to land and not to the person occupying the land, or in the nature of an easement to be enjoyed with the land, yet that that word may be used in a sense, different from its appropriate legal effect, to convey a right or easement not adhering to the land in the way of an appurtenance. Under this, which may be called the conventional meaning of the word, will pass an easement which is essential to the enjoyment of the premises demised, and which was enjoyed with them at the time of the

demise. Whether the word "appurtenances" was, in any particular case, used in its flexible import or in its strict legal sense, must in each case depend upon the circumstances of the case, upon the language of the instrument or the circumstances of the property; for one of the cases says that all these circumstances must be looked to in ascertaining the meaning in which the term was used. The flexible meaning may be given to it by express words, such as "used with it," "as hitherto used," or "as now used with it," as was the case in *Dobbyn v. Somers (a)*, where these supplemental words operated to show the meaning in which it was then and there used. In the present case, there are circumstances which furnish not only admissible but abundant evidence to justify that interpretation being put upon the word, so as to give it the effect of passing this right of way, the want of which would defeat the very use and enjoyment of the property conveyed by the lease. It was said that, as the Canal Company are the owners in fee, the grant of the lease was an extinguishment of the right of way. But there was no unity of possession; and the unity merely of the seisin would not, without the possession, produce that extinguishment. And, so far from there being unity of possession, the possession and right of possession were from the date of the agreement in 1802, down to the time of action, out of the Canal Company. The storehouse and the possession of it were out of the Canal Company; and although they had the seisin in fee as to the land, that was not and could not operate as an extinguishment; for still the road remained devoted to the public, and was described as bounding the premises at the time of the agreement in 1802. Up to the date of the lease in 1848, the enjoyment of the easement continued in the party who had entered into the contract in 1802; and the joinder of the lessee holding under the contract in the lease of 1848 operated as a surrender *eo instanti* that the lease was executed which carried into effect the contract of 1802; or perhaps as a new creation of the right under the lease. But, at all events, the lease operated to unite the possession

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under the contract virtually with the possession under the lease. Now the nature of this easement being such as made it essential to the use and enjoyment of the property demised, it appears to me, on the authorities cited, that there was quite sufficient evidence to give to the word "appurtenances" in this lease an operation sufficient to carry this easement of the right of way along with the property which passed by the lease; and that therefore there was evidence to go the jury to justify them in finding that it passed under this lease.

Taking all these circumstances into consideration, there was, in my opinion, evidence to sustain the verdict.

O'BRIEN, J.

In this case, the plaintiff obtained a verdict on the last four paragraphs of his summons and plaint, in which he states his possession of a messuage in Athy, and complains of a disturbance of a right of way, to which he claims to be entitled, over an adjacent piece of land or private road leading from that messuage to the canal, in one direction, and to a public street or highway in another direction. The defendants traversed that right of way. The plaintiff, at the trial, gave up the other paragraphs of the summons and plaint, the issues on which were accordingly found against him. The defendants gave no evidence; but at the close of the plaintiff's case, defendants' Counsel required my LORD CHIEF JUSTICE to direct a verdict for defendants on those four paragraphs, on the ground that plaintiff had not given sufficient evidence to sustain his claim to said right of way. The CHIEF JUSTICE refused to do so; and then (by arrangement between the parties) directed a verdict, as to said four paragraphs, for the plaintiff, reserving liberty for defendants to move the Court to have such verdict entered for them in case the Court should be of opinion that there was not sufficient evidence to go to the jury in support of plaintiff's claim. Defendants' Counsel did not require that any question should be left to the jury; and the effect of the arrangement at the trial is, that plaintiff should retain his verdict if he had given sufficient evidence at the trial to go to the jury in support of his claim to

said right of way. I am of opinion that there was sufficient evidence for the purpose; and that, accordingly, the verdict should not be set aside. It appears from the evidence, and admissions at the trial, that, in 1802, the Grand Canal Company, being then entitled in fee-simple to the messuage in question (consisting of a store and yard, &c.), and also to the piece of land over which the right of way is claimed, entered into an agreement with a Mr. Rawson, for a lease of said messuage to him for ninety-nine years; that Rawson afterwards assigned his interest under said agreement to a Mr. Goodwin; that, in 1848, the Grand Canal Company, in pursuance of said agreement of 1802, executed to Goodwin, with Rawson's consent, a lease for ninety-nine years, from 1802, of said messuage, "with the appurtenances thereunto belonging;" that plaintiff was then, and had been for some years previous, in possession of said messuage, as under-tenant of Goodwin; and that, some time after the execution of said lease of 1848, plaintiff became the assignee of Goodwin's estate and interest thereunder. The boundaries of the messuage are stated in that lease, and also in a map annexed thereto and referred to therein; and it appears that the southern boundary of the messuage was the piece of land over which the right of way is claimed, and which is represented in the lease and map as "*a road*." Plaintiff contends that the right of way in question passed by that lease, though not expressly mentioned in it; and in my opinion there was sufficient evidence given at the trial to warrant that conclusion. Direct evidence was given to show that, so far back as the year 1821, and from thence continuously until after the lease of 1848, and until about the year 1852 (nine years before the trial), there had been two gates or doors in the southern wall of the messuage or store, opening from the store upon the piece of land or road in question; and that, during the entire of that period, the several parties in possession of the store, under the agreement of 1802 and lease of 1848 respectively, had continuously, publicly, and without interruption, exercised the right of way now claimed; passing and repassing over said piece of land, from and into the store, through those gates: which gates would, in fact, have been perfectly useless but for said right of way. It also

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appeared that during said period said piece of land remained open, without there being any inclosure or obstacle to interfere with the exercise of said right of way. Though this direct evidence of the condition of the premises and user of the right of way did not go further back than the year 1821, the jury would have been warranted in concluding, and we are therefore entitled on the present motion to assume, that the same state of things existed from the time of the agreement of 1802, and previous thereto. Evidence was also given at the trial as to the great importance and utility of this right of way to the occupiers of the store, which would have fully warranted the jury in finding that the right of way in question (though not what is called a way of necessity, inasmuch as there was another passage to the store) was yet necessary for the beneficial enjoyment of the demised premises in the condition in which they were at the time of the lease of 1848, and in which they had been enjoyed for so many years previous thereto, by the parties claiming under the agreement of 1802. On this motion we should assume, in support of the verdict, any conclusion or inference which the jury might have reasonably drawn in plaintiff's favor, from the evidence given at the trial. And, having regard to the evidence to which I have referred, I am accordingly of opinion that, although the right of way in question was not mentioned in the lease of 1848, and although that lease, in granting the "*appurtenances*," did not contain the further words "*therewith usually held and enjoyed*," or any words to the same effect, yet that such right of way passed by that lease to the lessee, inasmuch [to use the language of Chief Justice Tindal, in *Hinchliffe v. Kinnoul* (a)] as such right of way was "incidental to the enjoyment of that which was the clear and manifest subject-matter of the demise." In that case (which appears a direct authority on the question now before us) the plaintiff claimed a right of way over a passage adjoining to and bounding a certain house and premises demised by a lease of 1819, which lease contained no reference to the right of way; and (as in the present case) granted "*the appurtenances*," without adding any such words as the words "*usually held and enjoyed*." The

(a) 5 Bingh., N. C., 25.

jury however found that the use of a certain coal-shoot and pipes, which ran into the demised house and premises, and which the lessee was bound by covenant in said lease to keep in repair, was necessary for the convenient use and occupation of said demised premises, and that said coal-shoot, &c., could not be used and kept in repair without the use of said disputed way; and upon that state of facts, Chief Justice Tindal, in delivering the judgment of the Court, held (p. 25) "that the right of way passed to the lessee, as "incidental to the enjoyment of that which was the clear and manifest subject-matter of the demise." In the present case the facts are different; but considering that, at the time of the lease of 1848, the two gates or doors already mentioned were in the wall of the store, abutting upon the piece of land or road over which the right of way is claimed, and that said gates or doors were then, and had been for about twenty-seven years previously, used as entrances into said store, for goods, &c., and could not have been so used without the use of the way in dispute, I think there is abundant evidence to bring the case within the principle stated by Chief Justice Tindal, and to warrant the conclusion that said right of way passed by said lease of 1848.

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A similar principle is also laid down by Chief Baron Pollock, in *Glave v. Harding* (a), where he states:—"It cannot be denied "that if a man build a house, and there is actually a way used, or "obviously and manifestly intended to be used, by the occupiers of "the house, the mere lease of the house would carry with it the "right to use the way, as part of its construction." Baron Bramwell, in his judgment, also laid down the principle (though he did not think it applied to the peculiar facts of that case) that where, at the time of a lease, the condition of the demised premises showed the intention that a right of way to a particular gate or door should be exercised, such right of way, though not mentioned in the lease, would pass by it, as an apparent and continuous easement. In the case now before us, the evidence is clearly sufficient to warrant the conclusion that, at the time of the lease of 1848, it was *obviously and manifestly intended* that the right of way in question should

(a) 27 Law Jour., N. S., Exch. 286, 292.

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be used by the occupiers of the store. It appears to me that these authorities render it unnecessary to refer in any detail to the various cases cited in the argument, as to the obstruction of lights and windows. The general principle applicable to those cases is laid down by Baron Bailey, in *Canham v. Fisk* (a), (which was a case as to a right of water), and in which he states:—"If I build a house, and, having land surrounding it, sell the house, I cannot afterwards stop the lights of that house. By selling the land, I sell the easement."

Plaintiff's Counsel have also relied on the words "*appurtenances thereto belonging*," in the granting part of the lease of 1848, as sufficient (though without the addition of any such words as "*therewith usually held and enjoyed*") to pass the right of way as an appurtenant. That question also arose in *Hinchliffe v. Kinnoul* (b), but it was not necessary to decide it, as Chief Justice Tindal rested his judgment upon the other ground already mentioned, namely, that the right of way passed as an incident to the subject-matter of the demise. For a similar reason, I consider it unnecessary to decide it in this case. Chief Justice Tindal stated however, in his judgment, that there were strong authorities (to some of which he referred) to show that the words "*appurtenances thereto belonging*" were sometimes capable of a wider interpretation, and of carrying more than was an appurtenant, in the strictly legal sense of the word. I may also refer to the case of *Dobbyn v. Somers*, lately decided in this Court (c), in which the effect of those words was much considered.

Defendants' Counsel however contend that, inasmuch as, at the time of the lease of 1848, the Canal Company were owners in fee of the land over which the right of way is claimed, and also owners in fee (subject to the yearly tenancy under the agreement of 1802) of the premises demised by that lease, the right of way, even supposing it to have existed, was absolutely extinguished by unity of possession; inasmuch as the yearly tenancy determined upon the execution of the lease. I think this objection is answered by

(a) 2 Cr. & Jer. 126.

(b) *Ubi supra*.

(c) Now reported 13 Ir. Com. Law Rep. 293.

the case of *Hinchliffe v. Kinnoul* (a), where one lease commenced immediately on the determination of the other; and yet it was held that there was no unity of possession to extinguish the right of way. It is moreover difficult to see how this question of extinguishment, by unity of possession, can arise with reference to a right or easement which is claimed (as in the case now before us) upon the ground of its being necessary for the convenient enjoyment of the premises demised by a lease as in their then condition, and where the lessor is also owner in fee of the land over which such right or easement is claimed. The very fact of his being owner, both of the demised premises and of the land over which the easement is claimed, is a reason why he should not be allowed to interrupt that easement, when it is necessary for the reasonable and convenient enjoyment of the demised premises in their then condition. If he were not owner of both, the question would not arise; and, in my opinion, the right of way claimed in this case would still exist, even if there had been an actual unity of possession, by the yearly tenancy having been surrendered to the Canal Company the day before the execution of the lease of 1848.

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Defendants further contend that even supposing the right of way to have been granted by the lease of 1848, it has since been lost by non-user. The evidence bearing on this point was as follows:—It appeared that one of the two gates had been (as already stated) closed up about the year 1852, that the other of them was closed up about the year 1855 (six years before the trial), in a manner which was apparently for a temporary purpose, the jambs of that gate having been left in the wall; and that the right of way was not used or claimed by plaintiff from the closing of the second gate until the year 1860, when plaintiff, having heard of the intention of the Canal Company to set to defendants the ground over which the right of way is claimed, served the notice of the 7th of May 1860; notwithstanding which, the Canal Company afterwards made the setting to defendants, who then inclosed the ground with walls, and caused the obstruction for which this action is brought. Defendants' Counsel contend that, on this state of facts, the CHIEF JUSTICE

(a) *Ubi supra*.

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should have himself decided that the right of way had been abandoned and extinguished by non-user, and should, without taking the opinion of the jury on the question, have directed a verdict for defendants on that ground. Defendants' Counsel did not require that any question should be left to the jury on the matter, and therefore, in order to sustain their objection to the verdict on this ground, they must establish that they were entitled to such direction. I am clearly of opinion they were not so entitled. It is true that, in order to destroy a right of way or other easement by non-user, it is not necessary to prove a cesser of use for twenty years, but that a cesser of the use for a shorter period, accompanied by an act clearly indicative of an intention to abandon the right, would be sufficient to destroy such easement. There is however no authority to show that on such a state of facts as proved in this case, the Judge at the trial should, without leaving any questions to the jury, hold that an easement had been abandoned and extinguished by non-user. With respect to the case of *Moore v. Rawson* (a), which was an action for obstruction of light, and in which the plaintiff was nonsuited on the ground that the easement had been lost by non-user, the facts were essentially different from those now before us. In that case the party entitled to the easement had, about seventeen years previously, taken down the wall in which the old windows were, and had built a blank wall, without windows, in its place; which remained in that state until about three years before the trial, when defendant erected a building against it. Plaintiff then opened a window in the same place where there had been a window in the old wall, and the light of the new window was obstructed by defendant's building. The Court confirmed the nonsuit, holding that on those facts it was incumbent on plaintiff to show that, at the time of the erection of the blank wall, the abandonment of the former light was only temporary, with the intention to resume it within a reasonable time. It would in fact have been unjust to have allowed the plaintiff to claim the easement again, where his acts had probably induced the defendant to erect the building he had done. But

(a) 3 B. & C. 332.

can it be said that, in the present case, the closing of the two gates (that of the second being in appearance but for a temporary purpose, and only five years before the notice of May 1860) was as indicative of the intention to abandon the easement permanently, as the substitution of the blank wall was in *Moore v. Rawson*? In that case also defendant had erected his building before the opening of the new window; whereas in this case plaintiff served his notice, insisting on the right of way, before either the Canal Company or the defendants had done any act on the faith of the supposed abandonment. It appears to me that if the opinion of the jury had been taken on this question of abandonment, they would have found in plaintiff's favor. In any event defendants were not entitled to the direction they contend for. And on these several grounds I think that plaintiff's verdict should be upheld, and the conditional order discharged.

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HAYES and FITZGERALD, JJ., concurred.

*In re* WILLIAM JONES ARMSTRONG.

Nov. 12, 19.

THIS was an application for a conditional order for a writ of *mandamus*.

The Counsel for the applicant, who is a J. P. and a Deputy Lieutenant for the county of Armagh, moved the Court for a conditional order for a writ of *mandamus*, to be directed to H. H. Hamilton, Q. C., Chairman of the Court of Quarter Sessions for the County of Armagh, and to other Justices of that county, commanding them, at their next general Quarter Sessions of the Peace in the said county, to charge the Grand Jury to inquire

The Court of Queen's Bench will not grant even a conditional order for a writ of *mandamus* commanding a Court of Quarter Sessions, which has already exercised soundly its judicial discretion in the matter, to send up to the

Grand Jury a bill of indictment for the publication of a malicious libel, instead of postponing it to the next Assizes.



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*Queen's Bench* written, composed and published in that county by the Rev. J.  
*In re* Quinn, of and concerning the applicant, as is alleged; and to  
 ARMSTRONG. charge the said Grand Jury with, and to lay before them, or  
 permit and suffer to be laid before them, such bill of indictment  
 as may be tendered to them, charging the Rev. J. Quinn with  
 writing, composing, and publishing said libels, and to inquire by  
 them concerning the truth thereof.

From the applicant's affidavit it appeared that two of the libels complained of had been published in *The Freeman's Journal*, on the 16th of March 1861, and in *The Dundalk Democrat*, on the 1st of April 1861, under feigned signatures, but under one and the same title—"The Crowbar Brigade in the county Armagh." The libels, which were set forth at some length, in substance charged the applicant with systematically exterminating his tenantry, especially the Roman Catholics, in the county of Armagh; and with taking delight in so doing. It further appeared that, prior to the publication of the alleged libels, the applicant had actively discharged the duties of a Magistrate for that county; but, in consequence of their publication, abstained from acting as such, from the time when he first knew of their publication down to the 5th of October 1861. In the month of April, the applicant brought actions for libel against the respective proprietors of the newspapers above-named, and also against the proprietor of "*The Irishman*," into which the libel had been copied from the *Dundalk Democrat*. The result of this last action did not appear; but, in each of the former, the applicant finally accepted a certain sum in lieu of damages, the defendants undertaking respectively to pay his costs, to publish an apology, and to deliver up to him the manuscripts of the libels. The manuscripts, when given up, appeared to be in the same handwriting. The affidavit then set out the proceedings which took place at the Court of Petty Sessions in Armagh, on the 11th of October, when the Rev. J. Quinn appeared there to answer the applicant's complaint for composing and publishing the libels in Armagh. The handwriting and the publication of the libels were proved by the applicant's witnesses. The defendant's

Counsel stated that the defendant only wanted an opportunity to prove the truth of the publications: which statement made the applicant resolve not to act again as Magistrate until the charges against him were disposed of. The applicant's Counsel required the Justices to take the informations of his witnesses, and bind the defendant in his own recognizance to take his trial at the next Quarter Sessions—the first tribunal competent to dispose of the case. The Justices refused so to do, but said they would send the case to the Assizes. The applicant thereupon withdrew the case; and, at the next Quarter Sessions, before the Grand Jury were discharged, applied by his Counsel to the Chairman, who is one of her Majesty's Counsel learned in the law, and to the other Justices there assembled, to charge the Grand Jury with a bill of indictment then tendered, and which contained three counts charging the Rev. J. Quinn with writing, composing, and publishing the said libels of and concerning the applicant. The names of four witnesses, two of whom were then present, were indorsed on the bill so tendered. The learned Chairman, in the name and presence of the other Justices, refused to receive the bill, or charge the Grand Jury with it; and directed the acting Clerk of the Peace not to receive it; whereby the applicant was injured and denied justice as of common right.

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Serjeant *Armstrong* and *William M'Mechan*, now moved the Court for the writ of *mandamus*.

The form of the commission of a J. P. shows that the Justices have jurisdiction to do the acts which the writ, if granted as sought for, will command them to do. The commission assigns them to inquire by the oath of good and lawful men of the county "of all "and all manner of treasons, murders, manslaughter, burnings, "unlawful assemblies, felonies, robberies, witchcrafts, enchantments, "sorceries, magic arts, *trespasses*, misdeeds, &c., and to hear and "determine all and singular the matters aforesaid (*treason excepted*), " &c. Provided always, that if a case of difficulty upon the determination of any of the premises shall happen to arise before you "or any two or more of you, then do not you or any two or more

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"of you proceed to give *judgment* thereon, except it be in the presence of one of our Justices of one or other Bench, or one of the Barons of our Exchequer, *or one of our Counsel learned in the law*,"—the Chairman of the county Armagh is one of her Majesty's Counsel learned in the law—"and we therefore *command* you and every of you that you diligently attend the keeping of the peace, ordinances and statutes, and all and singular other the premises, and at certain days and places, which you shall in that behalf appoint, you make inquiries upon the premises *and hear and determine* all and singular the premises (except as before excepted), and perform and fulfil the same. And we *command* our Sheriff that, on the day appointed, he cause to come before you men of his bailiwick by whom the truth of the premises may be inquired of." The Justices are thus stringently commanded to inquire of every one of the enumerated offences, treason *only* excepted. No discretion is left them, even in difficult cases, if, as happened in this case, one of her Majesty's Counsel was present on the Bench. That the jurisdiction exists is clear also from 2 *Hawk. Pl. Cr.*, bk. 2, c. 8, ss. 64, 66; *The King v. Rispal* (a); and *The King v. Higgins* (b). Counsel also stated that a search for precedents had been made; and that, in the month of October 1861, the Magistrates in Belfast had returned informations for a libel to the next Quarter Sessions. Also, at the Quarter Sessions held in April 1830, at Kells in the county of Meath, in the case of *The Queen at the prosecution of Russell v. C. E. Farrell*, a bill of indictment for a libel was found; and the party against whom it was preferred was tried, convicted, and suffered imprisonment. Also, in *The Queen v. Lindsay*, at Belfast, the Chairman fined a witness £20 for non-attendance. The Justices are bound to exercise their jurisdiction, as appears from their commission and their oath of office, which is to do right in all the articles of that commission. On this point, Counsel also cited *The King v. Mortis* (c); *The King v. Mullaney* (d); and submitted that *The King v. Mortis* was a very strong case as to the absence of discretion in the Court

(a) 1 W. Black. 368.

(b) 2 East, 5.

(c) 2 W. Black. 733.

(d) 6 C. &amp; P. 96.

having jurisdiction to entertain a bill; and that the duty of doing so was imperative. That there is no reported precedent for such a writ of *mandamus* is no reason why it should not now be granted: *Bagg's case* (a); *The King v. Barker* (b). The subject has a right to prefer a bill of indictment to some tribunal: 4 *Black. Com.*, p. 303. By their commission, the Justices are *commanded* to inquire of every case over which they have jurisdiction. In the Judges' commission there is not any mandatory clause. If therefore the Justices may refuse to lay a bill of indictment before a Grand Jury, *a fortiori* the Judges may refuse to do so, and thus the subject be deprived of the protection of the law which consists in having a right to prefer a bill of indictment, which is merely a charge in her Majesty's name. The Act against Vexatious Indictments (22 & 23 *Vic.*, c. 17) recognises this right. That Act does not abridge the right, but merely regulates its exercise, by requiring the prosecutor in certain named cases (of which libel is not one), before preferring a bill of indictment, to enter into a recognizance to prosecute it, if found, unless the accused party has been committed for trial, or bailed to appear and take his trial. This Court will *command* the Justices to do what their commission *commands* and their oath binds them to do. If the Justices are bound to do anything, they are bound to do everything which they are assigned to do; and, as the Court may compel them to hold the Sessions, it will also compel them to perform the duties of the Sessions: *The King v. Mullaney* (c).

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LEFROY, C. J.

We are all of opinion that there is so much of novelty in this application that we feel called upon to consider attentively whether we should make the order sought for; whether there is a foundation for making such a precedent? No case in point has been cited, either in England or Ireland; and therefore it becomes us to consider very maturely before we make a precedent for such an order.

(a) 11 Rep. 93 b.

(b) 1 W. Black. 352.

(c) 6 C. & P. 96.

M. T. 1861. At present, therefore, we will say no more than that we will  
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ARMSTRONG. consider of it.

*Cur. ad. vult.*

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LEFROY, C. J.

Nov. 19.

This is an application, which came before the Court a few days ago, for a conditional order for a writ of *mandamus*, to compel the Justices assembled at the Quarter Sessions for the county Armagh to receive and entertain a bill of indictment for a libel, and to proceed further to try and to determine the case. It is, at all events, as we intimated at the close of the argument, a rare and novel application; and whatever light may have been thrown upon it by the industry and learning of the Counsel who argued the case, we were not relieved from the consideration of its being novel and rare: for not a single instance was produced to us, although a very wide range of analogy was taken, of a case of this sort having existed, or even of a case having come before the Court requiring it to exercise the jurisdiction which we were, in this case, called upon to exercise. Upon this occasion it is not necessary, nor are we about to state anything upon the abstract principles of the case. Whether a case might not arise in which an application of this nature might, by possibility, be entertained, we do not say. But it is perfectly clear that, in this case, the application cannot be entertained; and I have only to state the facts of this case in order to demonstrate that proposition.

In this case informations for a libel were taken by the Justices at Petty Sessions; and they, in the exercise of the discretion which belongs to them, returned the informations to the Assizes. In substance, that was what was done; for they proceeded to avow their determination to send them forward to the Assizes, which they would have been warranted in doing; and thereupon the prosecutor withdrew, and applied to the Court of Quarter Sessions to do that which he now requires us to compel them to do by a writ of *mandamus*. I may observe that the Court of Quarter Sessions is not a Court of Appeal from the Petty Sessions, for this purpose. If, in the exercise of their judicial or magisterial discre-

tion, the Court of Petty Sessions thought it right to send the informations before them to the Assizes, the Court of Quarter Sessions has no right to review that exercise of magisterial discretion by the Court of Petty Sessions. But, further, in this case the application was made, directly and as an original application, to the Court of Quarter Sessions. That Court heard the application of the prosecutor, requiring them to receive the informations, and send a bill of indictment for a libel to the Grand Jury. The Court considered the matter, and decided that they would not entertain the application. And, even if they had thought fit to receive the bill, they might, in their discretion, have sent the case for trial to the Assizes. They however refused to entertain the case; and then the present application was made to this Court.

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Now, so far as concerns the case in respect to principle or in respect to novelty, whatever might be said upon these topics, we come now to deal with the case as it has come before us. There are peculiar circumstances in this case. It is a case in which the Justices, having heard the application, in the exercise of their magisterial discretion declined to exercise the jurisdiction which, it must be admitted, appears to exist on the face of the commission under which they act. It is a jurisdiction which, under the circumstances that came before the Quarter Sessions, and which have now been shown to us to exist, they ought not to have exercised upon that occasion—the jurisdiction, namely, of trying a case for libel. They therefore refused to entertain the case; and left the prosecutor to make the application which he has now made to us. If we were now to grant his application, and direct the Court of Quarter Sessions to receive this bill, and to proceed to dispose of this case and try it, we should be doing an illegal act; for we should be depriving them of the magisterial discretion which they are authorised to exercise, namely, that of sending a case of this sort to be tried at the Assizes. It would therefore be, in point of law, illegal to make the order sought for; and, in point of fact, it would be nugatory to make it: for, as it must go to them subject to the exercise of their judicial discretion, if they should even receive this bill, nevertheless they have already decided that, in their

M. T. 1861. judgment, it is not a fit and proper case for them to proceed upon,  
*Queen's Bench* and that it can be more fitly tried at the Assizes. We should  
*In re* therefore be doing an illegal act if we were to affect to restrain the  
ARMSTRONG. exercise of their discretion; and we should also be doing a nugatory  
act if, leaving them the free exercise of their discretion, whether  
they would proceed to try the case or would return it to the Assizes,  
we nevertheless issued this writ of *mandamus*.

Under these circumstances therefore it appears to us that we must, in the present case, refuse the application.

O'BRIEN, J.

In this case I entirely concur in the ruling of the Court, that we should refuse even a conditional order for the *mandamus*. The application is an extremely novel one; and, notwithstanding the great research of Counsel, no authority or precedent has been found to sustain it. The ground upon which the case has been chiefly pressed, namely, the jurisdiction which Courts of Quarter Sessions in Ireland have under their commission, is equally applicable to other cases in which, it is admitted, we should not interfere in the manner now required. The language of the commission is very general, and gives those Courts jurisdiction to try, not merely cases of libel, but other cases of the most serious character, even cases of murder; but it would be a startling proposition to contend for, that this Court should grant a writ of *mandamus*, commanding a Court of Quarter Sessions to receive and entertain a bill of indictment for murder, even though the statute 5 & 6 Vic., c. 38, whereby Courts of Quarter Sessions in England are deprived of the power of trying murders and certain other serious crimes, does not extend to Ireland. We have been referred to several authorities, where a *mandamus* has been granted directing the Quarter Sessions to hear and determine certain cases, in which the applicants would have been otherwise left without any remedy. Such instances have occurred in cases of appeals from the decisions of Magistrates, &c., where the Court of Quarter Sessions was, by statute, the only appellate tribunal. And in those cases the Court has granted the *mandamus* upon the ground that, if the writ was

refused, the subject would be left without the remedy which the law intended for him, and could not have his case determined. No such ground exists in the present instance, as the applicant may send up a bill of indictment at the Assizes: and it appears in fact that the Magistrates, who originally investigated this case at Petty Sessions, proposed to return it for trial at the Assizes, which appeared to them the proper tribunal for that purpose; but that Mr. Armstrong, the present applicant, refused to take it to the Assizes, insisting it should be tried at Quarter Sessions. It will therefore be his own default if the case be not tried.

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The granting of this application would however not only be without precedent, but it would be also at variance with some of the principles upon which this Court acts with respect to writs of *mandamus*. It is a general rule that such writ will not be issued to another tribunal, where, by doing so, we would interfere with a discretion vested by law in that tribunal, or where the issuing of it would prove nugatory. The present application is for a *mandamus* to direct the Court of Quarter Sessions that they should receive the bill of indictment, and send it to the Grand Jury; and that the Court should then, in the event of the bill being found, proceed to try the case. Now it is clear, and has been so admitted in the argument, that, even if the bill was found by the Grand Jury, it would still be in the power of the Court of Quarter Sessions, at their discretion, to transmit the case for trial to the Assizes, and to refuse to try it themselves. We could not, then, consistently with the rules of this Court, interfere with that discretion, by directing them to try the case, even if we did not concur in the opinion expressed both by them and the Magistrates at Petty Sessions, that the case was more properly triable at the Assizes. What then would be the effect of our granting the writ, even for the limited purpose of compelling the Court of Quarter Sessions to receive the bill and send it up to the Grand Jury? They have already (as it were, by anticipation) declared how, in the event of the bill being found by the Grand Jury, they would exercise the discretion, which they unquestionably would have, of trying the case themselves or transmitting it to the Assizes; and they have refused to receive the



M. T. 1861. bill, upon the intelligible ground that it would be useless for them  
*Queen's Bench* to do so; that the case would ultimately have to be tried at the  
*In re* Assizes; and that accordingly the bill of indictment should more  
 ARMSTRONG. properly be preferred there.

On these several grounds, I am of opinion that the conditional order should not be granted.

HAYES, J

This is an application for a *mandamus* to the Magistrates of the county of Armagh, in Quarter Sessions assembled, commanding them to take cognizance, and permit the prosecution by indictment before them, of a certain charge of libel which Mr. Armstrong professes himself ready to make before that tribunal, against the Rev. John Quinn.

The application is a novel one, and on that account may deserve discussion.

On the 11th of October last, Mr. Armstrong came before the Magistrates in Petty Sessions, and there complained that he had been made the subject of certain libellous attacks in *The Dundalk Democrat*, and other newspapers; in the course of which he, a Magistrate, and a landed proprietor, had been denounced as "*an exterminator*;" that he had discovered the true author of those attacks to be Rev. Mr. Quinn, a Roman Catholic clergyman in that county; and prayed the Magistrates to receive his depositions and proceed to make Mr. Quinn amenable to a criminal prosecution for libel; giving the Magistrates, at the same time, to understand that, until this prosecution should be brought to a close, he would decline to act as a Magistrate, or take his place among his brethren. The Magistrates at once professed themselves ready to do their duty, and to receive the depositions, with a view to make Mr. Quinn amenable to answer the charge at the then next Assizes, to be held in March 1862. Mr. Armstrong protested against this course, and expressed a strong desire that, in a matter so deeply affecting his reputation, no opportunity should be lost of bringing the matter to a determination, and accordingly insisted that the informations should be returned to the next Quarter Sessions.

The Magistrates however declining to accede to this application, M. T. 1861.  
 the informations were withdrawn; and so the proceedings at Petty <sup>Queen's Bench</sup>  
 Sessions were brought to a close. <sub>In re</sub>  
 ARMSTRONG.

Mr. Armstrong, being thus disappointed, had recourse to the next Quarter Sessions held before Mr. Hamilton, one of her Majesty's Counsel, the Chairman of Sessions, and the other Magistrates there assembled. He produced his bill of indictment charging Mr. Quinn with libel, and called on the Court to permit him, without any formal informations being sworn, to have the indictment laid before the Grand Jury then empanelled; so that, if found, the prosecution might be at once proceeded with at Sessions. After a full consideration of the matter, the Court came to the conclusion that the application ought to be refused: and Mr. Armstrong, thinking himself aggrieved by this refusal, now seeks a remedy by his present application.

A good deal of argument has been expended by the applicant's Counsel, in order to show us that the Quarter Sessions had full jurisdiction to try a case of libel. That they have legal authority so to do, and that a conviction had before that tribunal is quite unassailable on the ground of being *coram non judice*, is a point which has not, so far as I am aware, been controverted for the last two centuries, or thereabouts. It was solemnly decided upon a writ of error, in *Rex v. Summers (a)*, and has continued to be the law in England from that time until the passing of the 5 & 6 Vic., c. 38. It is the law of Ireland until this day: and there is, I apprehend, no doubt or question about it. But the difficulty which Mr. Armstrong had to cope with at Petty Sessions, at Quarter Sessions, and in this Court, is to convince us that the Court of Quarter Sessions, having jurisdiction of the matter, was bound to exercise it in his favor, and at his request.

When the charge of an indictable offence is made before a Justice of Peace, either sitting alone or in Petty Sessions, and it appears that the case is one that ought to be prosecuted by indictment, the law has for many ages past vested in the Magistrates a discretion to select the tribunal to which the case is to be referred

(a) 1 Lev. 139.

M. T. 1861. for trial and final adjudication, whether it shall be to the Assizes, or to the Quarter Sessions. And this discretion they have felt themselves not only warranted but bound to exercise, according to the tenor and true spirit of their commission: for that instrument, which is in pretty much the same form for the last 250 years, after giving to the persons named in it, or any two or more of them, full power to *inquire* of all criminal offences, as therein fully set forth, and power "to *hear and determine* all and singular the matters aforesaid (treason excepted)," proceeds, by way of proviso, to command the Magistrates that "if a case of difficulty shall arise" they are not to proceed to judgment, unless in the presence of one of the Judges or Queen's Counsel. The practical interpretation that has been put on this proviso is, that all the less grave offences are sent for trial to Quarter Sessions, the more especially if that be the first tribunal in order of time; while all the more serious and difficult charges, and with which, from its constitution, that tribunal is less competent to deal, are referred not to the Quarter Sessions, but to the Assizes. And notwithstanding that the 1 & 2 *Ph. & M.*, c. 13, s. 4 in England, and the 10 *Car.* 1, st. 2, c. 18, s. 1 in Ireland have directed the Justices, who bail or commit for manslaughter or felony, to certify the examination and recognizances at the next general gaol delivery, yet, in the exercise of a sound discretion, the committing Magistrate has been in the habit of sending petty larcenies and small felonies for trial to Quarter Sessions, and of certifying the examinations and recognizances there. *Dalton* (c. 164), who brought out his book in the year 1618, lays that down as the practice of his time, citing the 3 *Hen.* 7, c. 3 (*Eng.*), as his authority; which enacts that two Justices shall have power to admit to bail persons imprisoned for light suspicion of felony, unto the next General Sessions, or to the next gaol delivery. That Act was in force in Ireland until the 9 *G.* 4, c. 53. The law as laid down by *Dalton* is cited by Mr. *Chitty* (1 *Cr. Law.*, p. 91, 1st ed.) as the law of his day also. The 9 *G.* 4, c. 54, ss. 2, 3, passed after the repeal of the statutes of *Hen.* 7 and *Car.* 1, when giving directions to the Magistrate as to taking examinations and bail, as well in cases of

misdeemeanor as felony, orders him to bind the witnesses to appear "at the next Court of Oyer and Terminer or gaol delivery, or other Court at which the trial of such offence is intended to be had, then and there to give evidence." By whom is this intention to be entertained? and who is the person to select the tribunal? Is it not manifestly the Magistrate, and not the prosecutor or prisoner? And does not common sense concur with universal experience, in fixing this as the true and undoubted state of the law?

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I am therefore of opinion that the Magistrates at Petty Sessions had the discretion vested in them to send the case for trial either to Quarter Sessions or Assizes; and I am also of opinion that, taking into consideration the nature and character of the libel of which this gentleman complained, and the position of the parties concerned, and all the other circumstances of the case, which the Magistrates were bound duly to consider, they exercised their discretion soundly and well, in not yielding to the solicitations of the prosecutor, and insisting that the case, if to be sent by them for trial at all, should be sent to the Assizes.

Not satisfied with this determination at Petty Sessions, Mr. Armstrong brings the subject before the Court of Quarter Sessions, and insists, as a matter of right, that that Court was bound to take cognizance of his case by sending his bill of indictment before the Grand Jury; and he also insists by his Counsel before us, that if the bill had been found, the Court of Quarter Sessions was bound to proceed to try it by a petty jury.

It is unnecessary here to say anything as to what has been sometimes contended for before the passing of the 22 & 23 Vic., c. 17, as to the right of the subject in any case to present his bill of indictment to the Grand Jury without any informations having been previously sworn, or without the defendant being made or attempted to be made in any way amenable, though such a course would greatly narrow the benefits intended to be conferred by the Prisoners' Counsel Act (6 & 7 W. 4, c. 114); suffice it to say, the applicant here has insisted on no such right. He is willing to ask the Court to charge the Grand Jury with the indictment, but insists

M. T. 1861. that on his so asking, the Court is bound to accede to his request.  
*Queen's Bench*  
*In re*  
 ARMSTRONG. In that I apprehend he is mistaken. The words of the commission as to "a case of difficulty" apply quite as forcibly and even more directly to the Justices in Quarter Sessions than to the single Justice or to the Petty Sessions, and the former tribunal is bound to be quite as vigilant in the exercise of its discretion as the latter. Accordingly it has become the well established practice, that if the Justices at Quarter Sessions shall, at any time before the prisoner has been given in charge to the jury, come to the conclusion that the case is not one which ought to be tried at Sessions, they transmit it with the informations, recognizances, &c., to the Assizes, to be there tried and disposed of. In the case of *Rea v. Wetherell (a)*, a bill of indictment had been found against the prisoner for an escape; after which the Justices transmitted the case to the Assizes. On the matter coming before Baron Wood, that learned Judge doubted his authority to try an indictment so transmitted to him, and actually refused so to do; but having stated the case for the opinion of the Twelve Judges, and to serve as a rule in similar cases, the Judges were of opinion that the prisoner should have been tried at the Assizes, upon the indictment found at the Sessions.

I am of opinion then, that the Magistrates at Quarter Sessions, like the Magistrates at Petty Sessions, were not only at liberty, but it was their duty, to exercise their discretion, as to whether the case was one which it was proper to dispose of at that tribunal. And, for the reasons already assigned, I think that that discretion was soundly and wisely exercised, and at all events that we have no authority to interfere with it.

Because then, it appears to me that the law has invested the Magistrates with a full discretion in the matter, with which we have no power to interfere; and that that discretion has been wisely exercised, I think that we ought not to give the slightest encouragement to an application of this kind, by granting even a conditional order.

(a) *Russ & Ryan*, 381.

FITZGERALD, J.

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I quite concur in the conclusion at which the Court has arrived. The judgments of the LORD CHIEF JUSTICE and my Brother O'BRIEN, but especially that of my Brother HAYES, have so exhausted the subject, that I do not profess to add anything in substance to what they have stated. But there is one point upon which I wish to make an observation. The applicant, as I understood the argument of his Counsel, claimed a writ of *mandamus* to the Court of Quarter Sessions of the county of Armagh, as a matter of right; alleged that it was his client's right to present a bill of indictment for a defamatory libel there; that that Court was bound to receive it; that the Justices there presiding had no discretion to exercise in the matter; and that, if the Grand Jury had found a true bill, the Justices were equally deprived of all discretion, and were bound to go on and try the case.

During the argument, I asked whether a more speedy trial could not in fact be had at the coming Spring Assizes? and the answer I received was in the negative; because, as was alleged, upon the issuing of a *mandamus*, the Court of Quarter Sessions would be bound, at its next Sessions, to proceed; and and if a true bill is found, to issue a bench-warrant against the defendant; and having by this means brought him into Court, must then and there proceed to put him on his trial. There was, therefore, no doubt as to the nature of the present application. If the Court of Quarter Sessions had no judicial discretion in the matter, why was an application made to that Court at all? The prosecutor was entitled in that case to take the bill of indictment up to the Grand Jury room, knock at the door, hand in the bill, and call upon the Grand Jury to entertain his case, and dispose of it according to law. But, assuming that the Court of Quarter Sessions had a judicial discretion to exercise, if we can grant this application at all, we can grant it only upon the ground that the Court below has exercised its discretion unwisely and unsoundly.

I agree in the proposition that, if the Court below had entertained

M. T. 1861. *Queen's Bench*  
*In re*  
 ARMSTRONG. the bill of indictment, and that the Grand Jury found a true bill, still there was a discretion remaining in the Court of Quarter Sessions to transmit it to the Assizes, in order to have it tried there in a more solemn manner before a Judge of one of the Superior Courts, upon the ground that it was a case of difficulty which would be more conveniently tried at the Assizes. The applicant indeed urged upon us that, because the Chairman of the County Armagh happens by accident to be one of her Majesty's Counsel, the discretion of the Court of Quarter Sessions ceased to exist; and we were told the law was that, if the Chairman of the county was a stuff gownsman, the Court of Quarter Sessions had a judicial discretion in the matter, but that, if he was a silk gownsman, or being a stuff gownsman, was called within the Bar during the Sessions, the discretion was thereby determined. This is absurd. Whatever may be the language, undoubtedly large, of the Justices' commission, it has, during the course of a long unvarying usage, acquired this interpretation that, the Court of Quarter Sessions may exercise a judicial discretion, and transmit a difficult case to the Assizes. Was this then likely to prove a difficult case?

In the course of the argument, I asked, why was the prosecutor so urgent to try this case at the Quarter Sessions. It struck me that a gentleman in the position of Mr. Armstrong would be anxious to have it tried in the most solemn manner at the Assizes, when a Judge of one of the Superior Courts would preside at the trial, when the Grand Jury would be composed of the first gentlemen of the county, and when a panel of better and more intelligent men than usually attend at the Quarter Sessions would be present. The answer given to my suggestion was, that the anxiety of the prosecutor was to clear his character from defamatory imputation, and for that purpose to get the earliest opportunity of disproving the truth of the libel. He told us further that, when he was before the Court of Petty Sessions, the reverend defendant, when the Justices proposed to send the case for trial at the Assizes, said:—"Very well; send the case to trial, and I will prove its truth:" and, on account of that statement, the prosecutor was anxious to have the earliest opportunity to try the case, and clear his character.

If such was his real motive, he might have applied to this Court for leave to file a criminal information: and one great advantage in that proceeding is, that the prosecutor has an opportunity of coming at the earliest moment to make his own affidavit, detailing the truth, and the whole truth, and showing that there was no ground for the imputation cast upon him. Again, if to ascertain the truth is the prosecutor's object, he may bring an action for libel against the reverend defendant: but in an indictment for a libel, there is great practical difficulty in satisfactorily investigating the truth or falsehood of the defamatory charge. The defendant cannot enter into a proof of its truth unless he specially pleads the truth, and is also prepared to show that the publication of it was for the public benefit, and that therefore the publication ought to have taken place; he must prove that the libel was true, and that its publication was for the public advantage. The 6 & 7 Vic., c. 96, s. 6, is the statute which enables the truth of the libel to be tried in a proceeding by way of indictment.—[The learned Judge, having read the 6th section, proceeded.]—Let us suppose that the object in this case was to investigate the truth. Can anyone, hearing that section read, doubt that this case presented at once to the Justices difficulties which made it unfit to be tried at the Quarter Sessions? The case presents at once a tissue of complicated special pleading, such as would task the abilities of an experienced special pleader. The libellous publication, as read by the learned Counsel, was of no common order, and presenting no ordinary considerations; and it was said that the Court of Quarter Sessions was to entertain the case at the next sessions; was then to make the reverend defendant amenable by a bench-warrant; should then put on him a rule to plead; and, on special pleas and replications, to try the issues; and, finally, to determine whether it was for the public benefit that the libel should have been published, and whether the very defence made had not aggravated the original libel. All this was, on the face of it, very absurd. It was apparent that an early trial was not the true motive for the prosecutor's eagerness to have his case tried at the Quarter Sessions. It is not for us to determine what was the real motive of the prosecutor. But we hold here that the Court of

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M. T. 1861. Quarter Sessions had a judicial discretion. We cannot say that they exercised that judicial discretion unsoundly. But we are clearly of opinion that, if the Court of Quarter Sessions had entertained this bill of indictment, and the Grand Jury had found a true bill, the case was one of that nature and character which might well be transmitted to the Assizes, and possibly be removed by a writ of *certiorari*, and tried at the civil side of the Court.

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*In re*  
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I concur therefore in the judgment of the Court, refusing to grant this application; and in doing so it is manifest that, instead of delaying, we shall expedite the trial. By sending the case to the Court of Quarter Sessions, the trial would be necessarily postponed until next April; so that if a speedy trial be the prosecutor's object, he will, by our refusal to grant the present application, have an earlier opportunity of clearing his character than he would have if he carried this motion.

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T. T. 1862.  
*Eschequer.*

## CHUTE v. BUSTEED.

(*Eschequer.*)

June 3, 4.  
Nov. 5, 6, 7,  
8, 18.

T. T. 1863.  
June 29.

THIS case came before the Court upon a demurrer to the summons and plaint, which stated that a fee-farm grant of mill premises, at the rent therein mentioned, containing a covenant to keep and deliver up the same in good repair, had been granted, in the year 1826, by Pierce Chute to John M'Carthy, his heirs and assigns, for ever. The summons and plaint then stated, by order of the Court, that prior to the breach, and prior to the 23 & 24 Vic., c. 154, the interest of the grantor had vested in the plaintiff, and that of M'Carthy in the defendant. The mill having been burned down, the plaintiff now sued the defendant for breach of the covenant to keep in repair.

The defendant demurred to the summons and plaint—First, because no privity of contract was thereby shown between the plaintiff and defendant, and because it did not thereby appear that the defendant was liable on the contracts or covenants entered into by John M'Carthy; secondly, because it did not sufficiently appear that the plaintiff was entitled to sue on the contracts or covenants entered into with Pierce Chute; and that it did not appear that the defendant was liable or accountable to the plaintiff for the breach of covenant therein mentioned.

*Robert Ferguson*, in support of the demurrer.\*

Fee-farm grants do not come within the scope of the Landlord

whether fee-farm grants come within the scope of the statute, the latter does not contain sufficiently clear and unequivocal indications of the intentions of the Legislature that it should have a retrospective operation.

To a summons and plaint, by an assignee of the original grantor of a fee-farm grant, against a defendant, as assignee of the original grantee, for a breach of covenant, committed prior to the 1st January 1861, the defendant demurred.—

*Held*, that fee-farm grants come within the scope of the Landlord and Tenant Law Amendment Act (Ireland) 1860 (23 and 24 Vic., c. 154). And (FRIGOT, C.B., *dissentiente*) that fee-farm grants, executed prior to the passing of that statute, are affected by its provisions.

*Per FRIGOT, C. B.*—That, without expressing any opinion as to

\* This case was argued upon the 3rd and 4th of June 1862, *coram* FITZGERALD, HUGHES, and DEASY, BB. At the close of the argument, their Lordships directed that it should be re-argued before the Full Court.

**M. T. 1862.** and Tenant Law Amendment Act (Ireland) 1860 (*a*); or, admitting,  
**Eschequer.** that they do, the sections of that statute in which allusion is made  
**CHUTE** to fee-farm grants apply only to fee-farm grants executed subse-  
**v.** quent to the 1st of January 1861—*i. e.*, the Act is not retrospective.  
**BUSTEED.** The Landlord and Tenant Act 1860 repeals all preceding statutes  
**Nov. 5.** which referred to the relation of landlord and tenant (*b*), save those  
 which relate to fee-farm grants, viz., the statutes of *Quia Emptores*,  
 11 *Anne*, c. 2, s. 7; 12 & 13 *Vic.*, c. 105, ss. 20 & 22, re-enacted  
 and extended by the 14 & 15 *Vic.*, c. 20, s. 1 (*c*). But the intention  
 of the Legislature, to exclude fee-farm grants from the operation of  
 this Act, appears also from the preamble, which states that it is  
 expedient to consolidate and amend the laws relating to “landlord  
 and tenant” in Ireland. Landlord and tenant are the persons  
 named in the Act. No new meaning is to be attached to the  
 words, unless it be expressly defined: *Black v. Davis* (*d*). It was  
 decided that the old ejectment statutes did not apply to fee-farm  
 grants, because the relation of landlord and tenant was not created  
 thereby: *Lessee Bond v. The Trustees of Sterne's Charities* (*e*);  
*Lessee Orr v. Stevenson* (*f*); *Cowan v. Chambers* (*g*). But the  
 Act of 1860 goes on to define, in the 3rd section, upon what the  
 relation of landlord and tenant shall for the future be deemed to be  
 founded—*i. e.*, “upon the express or implied contract of the par-  
 ties;” and by abolishing the necessity of a reversion, and thus  
 annulling *Pluck v. Digges* (*h*), *Lessee Fawcett v. Hall* (*i*), *Lessee*  
*Porter v. French* (*k*), points to the class of demises to which it is  
 applicable—viz., all demises save those of the fee. The words  
 “*freehold estate*,” in the 4th section, and “any lease or other  
 contract of tenancy, whether of *freehold* or for years,” in the 45th  
 section, do not include fee-farm grants. “Freehold” is there used  
 in contradistinction to “leasehold,” and refers, not to grants of the  
 fee, but to “estates held for life or for some uncertain interest,” &c.

(a) 23 & 24 *Vic.*, c. 154.

(b) Sec. 104.

(c) Schedule B to Act.

(d) *Batty*, 88.(e) *Batty*, 87.(f) 5 *Ir. Law Rep.* 2.(g) *Hayes's Rep.* 546.(h) 2 *D. & C.* 180.(i) *Al. & N.* 248.(k) 9 *Ir. Law Rep.* 541.

*Watkins on Conveyancing*, p. 65 (*Coote's ed.*); *Shelford on Real Property*, p. 110. M. T. 1862.  
Exchequer.

Fee-farm grants cannot be included under the words "contract of tenancy," in the 9th section, which is a re-enactment of the old law; as by it, upon the death of the tenant, they would pass to his personal representative, and not his heir. Where the Act was intended to affect fee-farm grants, they are expressly mentioned, viz, in the 25th and 52nd sections; therefore the words "contract of tenancy" cannot be strained so as to include them.

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v.  
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But, assuming that fee-farm grants come within the operation of the Act 1860, that statute is not retrospective, except where made so expressly—*e. g.*, the 10th and 18th sections. A fee-farm grant cannot be included under the word "lease" in those sections; and as regards the 10th section, which deals with covenants against alienation, it was expressly decided, in *In re Quin* (a), that a covenant against alienation, without license from the landlord, is repugnant to the nature of the estate created by a fee-farm grant, and therefore void.

That being the state of the law prior to the 1st of January 1861, if the statute be retrospective, and the relation of landlord and tenant exist between the plaintiff and defendant, the defendant might now be liable for past breaches of a void covenant. The 3rd section must be prospective, for two reasons—first, the rule of law is that, when a statute is intended to be retrospective, it must be clearly expressed to be so; secondly, the words "shall be" mean "in future:" *Moore v. Durden* (b); *Towler v. Chatterton* (c); *Moore v. Phillips* (d); *Thompson v. Lack* (e); *Marsh v. Higgins* (f); *Cornill v. Hudson* (g); *Williams v. Smith* (h).

Some of the sections of the Act under discussion are prospective; others are retrospective. The 3rd, 4th, 9th, 11th, 26th, 28th, 29th,

(a) 8 Ir. Chan. Rep. 579.

(b) 2 Exch. 22.

(c) 6 Bing. 258.

(d) 7 M. & W. 536.

(e) 3 Com. B. 540.

(f) 19 Law Jour., C. P., 297; S. C., 9 Com. B. 551.

(g) 8 Ell. & B. 429.

(h) 2 Hurl. & Nor. 443; S. C., affirmed in Exch. Cham., 4 Hurl. & Nor. 559.

M. T. 1862. 31st, 32nd, 41st, 42nd, 43rd, are prospective; the 10th, 18th, and *Exchequer*. 19th are retrospective. It will be contended, on the other side, that the 12th section, which re-enacts and extends the 10 *Car.* 2, sess. 2, c. 4 (Irish), is retrospective; but that section is to be read with the 3rd. The word "holden" is to be construed in it as in the 31st section; and as that section creates a new liability, it must be prospective, by the general rule of law already referred to, since it contains no saving clause.

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*H. P. Jellett* (with whom was *J. Clarke*), contra.

The interpretation clause of the 23 & 24 *Vic.*, c. 154, defines a lease to mean "any instrument in writing, whether under seal or "not, containing a contract of tenancy in respect of any lands in "consideration of a rent or return." While the law did not consider the feudal relation of landlord and tenant to exist between the grantor and the grantee in a fee-farm grant, it was always assumed that a contract of tenancy existed between them. The interpretation clause defines a "landlord" to be "the person for the time being "entitled in possession to the estate or interest of the original landlord under any lease or other contract of tenancy," &c.

Fee-farm grants must be included under the second definition, the grantor therein under the first. If the word "freehold" in the 4th section, which is a re-enactment of the Irish Statute of Frauds (7 *W.* 3, c. 13), includes only leases for lives and years, fee-farm grants must now be created by livery of seisin. The words "act and operation of law" in the 9th section, include the case of the death of the grantor in a fee-farm grant, for his heir becomes his assignee by act of law: *Derisley v. Custance* (a). Fee-farm grants must be included under the words "contract of tenancy," in the 45th, 64th, 70th and 78th sections. They must also be included under the definition of a "perpetual interest" as being greater than a lease for lives renewable for ever, which appears clear from the 25th section. The words "shall be" in the second part of the 3rd section, and "shall have" in the 12th section, are retrospective. The words "*should have* devolved" in the latter section are syno-

(a) 4 Term Rep. 75.

onymous with "shall have;" as the definition of landlord includes all cases of devolution of title. If not so construed, they point to a devolution of the reversion before the passing of the Act. Two sections only of the statute are in terms retrospective, viz., the 10th and 18th; nor could it be otherwise, as it applies to all existing instruments and those to come into existence. "Shall be," in the 3rd section, refers to existing instruments. The 51st section is distinctly prospective. In the definition of landlord, in the interpretation clause, the words "shall have been acquired" prove the statute to be retrospective; as also the words "shall have" in the 12th section; which are absurd, unless they refer to a lease made before the passing of the Act. The 16th section must refer to "assignments" in existence at the passing of the Act. The 25th section cannot refer to fee-farm grants, as all reservations, &c., therein are void. If the 30th section do not include instruments made before as well as after the 1st of January 1861 (since the Burning Acts are repealed *in toto* by the schedule), a tenant under a lease, made prior to this Act, may now burn land with impunity. The 40th section applies to existing leases. The 41st section is prospective. The 44th section has been decided by the Court of Common Pleas to be retrospective.\*

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*C. Barry*, in reply.

PIGOT, C. B.

The summons and plaint in this case states that, by an indenture dated the 1st of March 1826, Pierce Chute demised a mill, dwelling-house and land to John M'Carthy, to hold to him, his heirs and assigns, for ever, subject to the rent and covenants therein mentioned. It states that, by this deed, the said John M'Carthy for himself, his heirs, executors, administrators and assigns, covenanted with the said Pierce Chute, his heirs, executors, administrators and

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\* *Mercer v. O'Reilly* (7 Ir. Jur., N. S., 383, 1862), affirmed in the Exchequer Chamber, as to the operation of the statute upon instruments executed before the 1st of January 1861.

T. T. 1863. assigns, "that he the said John M'Carthy, his heirs, executors,  
*Exchequer.* "administrators and assigns, should and would, from time to time,  
 CHUTE "and at all times thereafter during the continuance of the said  
 v. "demise, uphold, support, maintain and keep the said demised  
 BUSTEED. "premises, and all improvements made and to be made thereon,  
 "in good and sufficient order, repair and condition." The summons  
 and plaint then states that, before the breaches of covenant therein-  
 after mentioned, or any of them, were committed, and before the  
 passing of "the Landlord and Tenant Amendment Act (Ireland)  
 "1860, all the estate of Pierce Chute in the premises in the said  
 "indenture mentioned became, and at the time of the committing  
 "of the breaches was, vested in the plaintiff; and one moiety of all  
 "the estate and interest of the said John M'Carthy in the said  
 "premises had become, and was and continued, to be duly vested  
 "in the defendant." It then alleges a breach of the covenant,  
 stating that, while the plaintiff and defendant were such assignees  
 as aforesaid, "and before the passing of the before mentioned Act,  
 "the said mill, dwelling-house and premises became and were, and  
 "from thence hitherto continue to be, and now are, burnt down,  
 "dilapidated and destroyed, to the damage of the plaintiff in  
 "respect of his estate in the said moiety of the sum of £3000."

The summons and plaint was framed (I believe by amendment  
 at the instance of the Court) so as to raise, succinctly and without  
 the necessity of a replication, the question whether the statute  
 referred to gave to the plaintiff a right to maintain this action.  
 It was not I think contended, nor could it be successfully main-  
 tained, that this action could be supported irrespectively of the  
 statute. Although the word "demise" is used, the indenture as  
 pleaded plainly imputed an assurance to hold in fee at a rent;  
 in other words, what is usually termed a fee-farm grant.  
 There being no reversion, an action on the covenant could not  
 have been maintained at the suit of the assignee of the grantor,  
 irrespectively of the Landlord and Tenant Amendment Act. It  
 is unnecessary to refer to the authorities on this subject. The  
 plaintiff however contended that he was entitled to sustain the  
 action under the 12th section of the statute, which enacts tha.

"every landlord of any lands, holden under any lease or contract T. T. 1863.  
 "of tenancy, shall have the same action and remedy against Eschequer.  
 "the tenant, and the assignee of his estate or interest, or their CHUTE  
 "respective heirs, executors or administrators, in respect of the v.  
 "agreements contained or implied in such lease or contract, as BUSTEED.  
 "the original landlord might have had against the original tenant,  
 "or his heir or personal representative respectively."

The covenant on which the plaintiff sues is a continuing covenant. Although it was broken, before the statute came into operation, in the fact that the premises were then burnt down and not repaired, it was also broken after the statute came into operation, by the default in not then keeping the premises in repair. The breach is alleged in the plaint as a continuing breach. The covenant to keep in repair is broken by the fact that the premises were out of repair during the term: *Luzmore v. Robson* (a). If therefore the 12th section of the Landlord and Tenant Amendment Act applies to the instrument pleaded—that is, to a fee-farm grant executed before the statute,—it is plain that the plaint shows a breach of covenant for which the defendant is liable to be sued in this action.

Two questions therefore arise upon the Act of Parliament; first, whether the 12th section at all applies to a fee-farm grant; secondly, whether that section applies to grants executed before the statute.

As to the first question, its solution depends upon the construction to be given to the terms "landlord," "tenant" and "contract of tenancy," in the 12th section. And that again, as I think, depends upon the question whether a fee-farm grant creates the relation of landlord and tenant between the grantor and grantee, under the third section of the statute.

The first of these questions appears to me to be one of doubt and difficulty. On the one hand, it has been urged that the terms of the third section, in enacting that the relation of landlord and tenant "shall be deemed to exist in all cases in which "there shall be an agreement by one party to hold land *from and*

(a) 1 B. & Ald. 584.



T. T. 1863. *“under another, in consideration of any rent,”* cannot apply to a fee-farm rent; since, by the very nature of the contract, and by the operation of the Statute of *Quia Emptores* (which this Act of Parliament does not profess to repeal), the legal effect and import of the contract is, that the grantee shall hold, not from and under the grantor, but from and under the next superior lord: in Ireland, for the most part, the owner in fee holding directly under the Crown. Further, it is urged that, unless where a grant in fee is expressly mentioned in the statute (as in the 52nd section), it ought not to be intended to be included in its provisions, since it has omitted, from the enumeration of the Acts of Parliament and sections of Acts repealed, the provisions of former statutes which related to fee-farm grants, viz., the Statute of *Quia Emptores*, the 13 *Vic.*, c. 105, ss. 21 and 22, and the 14 & 15 *Vic.*, c. 20, and the 11 *Anne*, c. 2, s. 7,—the only express modification of the former law being contained in the 52nd section of the Landlord and Tenant Amendment Act, where it provides the remedy of ejectment for non-payment of rent due under a grant in fee-farm. Further, a variety of arguments has been urged, founded on terms used in several sections of the Landlord and Tenant Amendment Act, for the purpose of showing that a grant in fee-farm was not contemplated in the 12th section; such as the 25th and 52nd sections, both of which use the term “grant” where the Legislature intended to deal with a grant in fee-farm. And it was very strongly urged that the 3rd section was framed only to provide for that class of cases in which a party professed to grant a terminable interest, reserving a rent, but in which, by what purported to be a demise, he conveyed his whole estate and interest, leaving in himself no reversion. For a considerable time a controversy existed, whether in such a case ejectment for non-payment of rent could be maintained; and conflicting decisions were made upon this controversy, which was not terminated until the case of *Lessee of Porter v. French* (a). On the other side it was urged, for the plaintiff, that the true meaning of the 3rd section was, that it substituted contract for tenure as the basis of the relation of landlord and tenant; and that whether the estate granted,

(a) 9 Ir. Law Rep. 541.

in consideration of a rent, was an estate in fee or a terminable interest, was immaterial. And the plaintiff's Counsel relied upon several sections in the Act, for the purpose of showing that a perpetual estate or interest in the grantee was treated as subsisting where the grantor was treated as landlord and the grantee was treated as tenant; such as sections 25, 26, 52, 70 and 71. I shall not refer further to the topics urged in the able arguments addressed to us at both sides on this part of the case. I refer to them so far, because I wish to show that I have given them the consideration which they deserve, while I nevertheless abstain from pronouncing any opinion upon them.

Upon the second question, namely, whether *if* the 3rd and 12th sections include grants in fee-farm, they apply to fee-farm grants executed before the statute, I still retain, notwithstanding the ample discussion which this question has undergone, the same opinion which influenced my judgment in the case of *M'Areavy v. Hannan*(a). I am of opinion that such a change in the status of parties, as that of creating between the grantor and grantee of a fee-farm grant existing when the Act was passed, or between their real representatives, the relation of landlord and tenant, which had no existence before the statute, involving different rights and liabilities from those which, when the statute passed, subsisted between them, cannot be considered as effected by an Act of Parliament, without a clear and unequivocal indication in the statute that such was the intention of the Legislature. The 12th section cannot have the operation for which the plaintiff contends, without the aid of the 3rd section. And, for the reasons which I stated in my judgment in *M'Areavy v. Hannan*, I think that the 3rd section not only does not contain any such clear and unequivocal indication, but does contain words which indicate that it was not intended to have a retrospective operation by applying to previously existing grants in fee-farm—if it applies to such grants at all.

The present case appears to me to illustrate the wisdom and justice of the rule laid down by *Lord Coke*, 2 *Inst.*, p. 292, and applied

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(a) 13 Ir. Com. Law Rep. 70.

T. T. 1863. in *Moore v. Durdan* (a), and in so many other authorities, "*nova constitutio futuris formam imponere debet, non prateritis.*" When the statute passed, the defendant was under no obligation to repair the injury previously done to the premises, either under the covenant of the original grantee *to repair*, or under his covenant *to keep in repair*. But if the statute applies to the fee-farm grant before us, the result will be to cast a burden, by means of the covenant to keep in repair, on the defendant in this action, to an extent which may, for aught we know, involve an outlay of thousands of pounds in the rebuilding of the "mill, dwelling-house and premises" mentioned in the summons and plaint. The very freedom from the risk of such a liability, which under the law existing when the defendant became assignee, the assignee enjoyed, may have greatly affected the price which he paid for the assignment. And by an *ex post facto* operation of the statute, he may, under such circumstances, become bound to lay out, in repairs, double, treble, or it may be tenfold, the amount of what he paid, as purchase-money for the conveyance to him of an estate then liable to no such prospective burden.

It is needless to refer in detail to the other great changes in the status of the respective parties, which must be effected in reference to estates in fee, vested and enjoyed at the time of the passing of the Act, if the 3rd section be retrospective; and which, without the possibility of avoiding such a calamity, must very greatly diminish the market value of all that large portion of landed property held in fee, of which the original title deed, no matter what may have been its antiquity, and no matter how small the rent, and how great the value of the land or how large the rental, was a grant, in fee-farm of lands in Ireland.

I am of opinion that the defendant, upon this demurrer, is entitled to judgment.

FITZGERALD, B.

A grant in fee of certain premises, and which purports to reserve a rent to the grantor, having been made by deed in the year 1826,

(a) 2 Exch. 22.

and the grantee having thereby covenanted to keep the premises so granted in repair, the present action is, in substance, brought by the assignee of the rent against the assignee of the grantee, for breach of that covenant.

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The assignee of the rent and the assignee of the grantee respectively became such before the passing of the Landlord and Tenant Law Amendment Act (Ireland) 1860.

It is plain that the grant created no tenure between the grantee and the grantor; that the rent which it purported to reserve was not a rent service; and that no reversion of the premises remained in the grantor.

It is certain that before the Act of 1860 the present action could not have been maintained; that the relation of landlord and tenant, as then understood, did not subsist between the plaintiff and the defendant; and that, though the original grantor could have maintained such an action against the original grantee, on privity of contract, the case was not within the provisions of the 10 *Car.* 1, sess. 2, c. 10 (*Ir.*).

By the 12th section of the Act of 1860, it is enacted that "Every *landlord*, of any *lands holden under any lease or other contract of tenancy*, shall have the same action and remedy against the *tenant and the assignee of his estate and interest*, . . . . in respect of the agreements contained or implied in such lease or contract, as *the original landlord* might have had against *the original tenant*." The plaintiff relies on this section as warranting the present action. His contention is—first, that the grantor and grantee of the lands conveyed by the deed of 1826 are in the relation of "original landlord" and "original tenant" of "lands holden under a lease or contract of tenancy," within the meaning of this section; secondly, that he himself is "landlord" of "lands holden under a lease or contract of tenancy," within the meaning of the same section; and, thirdly, that inasmuch as the original grantor could have had such remedy as is sought in this action against the original grantee, he is entitled to it, by the express provision of the section, against the defendant, who is the "assignee of" the grantee's "estate and interest."

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It seems to me that if the first of these propositions be well founded, the second and third cannot be successfully disputed. As to the second, it is provided by the 1st section of the Act of 1860 that, in the interpretation of the Act, the word "landlord" shall include the person for the time being "entitled in possession to the estate or interest of the *original landlord*," under any "*lease or other contract of tenancy*, whether the interest of such landlord shall have been acquired by lawful *assignment*, devise, bequest, or act and operation of law, and *whether he has a reversion or not*." And as to the third, it seems to admit of no doubt that the remedy sought in this action could have been had by the original grantor against the original grantee.

The real question in the case appears therefore to be, whether the grantor and grantee of the lands conveyed by the deed of 1826 are to be considered as in the relation of "original landlord" and "original tenant," of "lands holden under a lease or contract of tenancy," within the meaning of the 12th section of the Act of 1860. In order to establish the affirmative, the plaintiff relies on the 3rd section of the Act, which enacts that—"The relation of landlord and tenant *shall be* deemed to be founded on the express or implied *contract* of the parties, and *not* on *tenure or service*; and a *reversion shall not* be necessary to such relation, which *shall be* deemed to subsist in all cases in which there *shall be* an agreement by one party to *hold* land from or under another, in consideration of any rent." Applying this provision to the deed of 1826, and to the relation thence arising between the original grantor and grantee, it is said to be clear that the relation must be deemed that of landlord and tenant. It is immaterial that the deed created no tenure; that it left no reversion in the grantor; and that the rent payable under it was not a rent service. It *does* contain an agreement by the grantee to hold land *from* or under the grantor, in consideration of a rent; and the very object of the Act was, in constituting the relation of landlord and tenant, to substitute an *agreement to hold* at a rent, whether tenure was in fact created or not.

This is, I think, in substance, the contention of the plaintiff.

On the other hand, it is insisted by the defendant—first, that, except where otherwise expressly provided, the Act has no operation with respect to agreements made prior to its passing; and the relation between the parties to such agreements must be ascertained, and can be ascertained, only by the law as it was prior to the Act. This, it is said, is to be gathered from, amongst other things, the future form of the enactment, and from that presumption against retrospective legislation which is a rule in the construction of statutes. And, secondly, that a grant of land *in fee* at a rent, and though in terms made to hold at a rent, is not, within the true meaning of the Act, an agreement by one party to hold land from or under another in consideration of a rent; or, in other words, is not a contract of tenancy. This is to be gathered from the peculiar state of the law as to grants in fee (the unrepealed statute of *Quia Emptores* expressly invalidating an agreement to hold in fee of the immediate grantor), and from the fact that, while the Act of 1860 repeals nearly the whole antecedent statute law as to landlord and tenant, it leaves unrepealed statutes giving to grantees in fee at a rent certain remedies of landlords, which it expressly gives to landlords in general; and that, when adding to those remedies a new one, by its 52nd section, it expressly mentions “fee-farm grants,” and apparently distinguishes them from “leases and contracts of tenancy;” and this, it is said, would be improper, or at least unnecessary, if fee-farm grants are contracts of tenancy within its general meaning.

Such is, I think, in substance, the contention of the defendant; and if either of these propositions be well founded, he ought, I think, to succeed.

With respect to the first proposition, I am of opinion that, except where otherwise expressly provided, the Act, and in particular the 3rd section, does apply to agreements made prior to its passing.

The object of the Act, as stated in its preamble, is to consolidate and amend the laws relating to landlord and tenant in Ireland; and this twofold object it proceeds to carry out, not separately or distinctly, but together, by the repeal of the principal existing enactments on the subject; by the re-enactment of many of the repealed

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provisions, sometimes unaltered, sometimes with alterations; and by making certain new provisions. In fact, a very considerable part of the statute consists of the re-enactment of what is repealed.

The benefit of consolidation of the statutable provisions relating to landlord and tenant, has at least as much relation to existing contracts as to future; but it is obvious, if such consolidation has no application to existing contracts, that not only must the greatest part of its benefit be unavailable to the present generation, but that, so far as it is available, the difficulty of administering and of knowing the law must be increased, by having two separate and distinct codes in operation at one and the same time, for an indefinite period.

I feel it almost impossible to understand the 104th, or repealing clause of the statute, if the intention of the Legislature were to leave the repealed code substantially in operation as to existing contracts. What is the meaning of keeping it in force specially as to "rights *acquired* and liabilities *incurred*," if it was to be kept in force *generally* as to antecedent contracts? or of keeping it in force "*so far* as necessary to support and continue any proceeding *theretofore* taken, or to be thereafter taken, upon any "*proceeding theretofore* commenced" (and which proceeding must, of course, have been an antecedent contract), if it was not intended that the new code should apply to proceedings *thereafter* taken on such antecedent contracts? The very qualification of the effect of repeal as to antecedent contracts, seems to show that in general the repeal was to affect them.

Again, while, on the one hand, consolidation and amendment are not kept distinct throughout the statute, on the other hand, they are not so carried out together without *occasional* express distinction between agreements made before and those made after the Act. There are provisions which, in terms, apply to agreements made after the Act only; while the rest, and far the greater part of the Act, makes no such distinction. This affords, to my mind, almost irresistible evidence that, in its general purview, the Act includes antecedent contracts. Sections 11, 16, 25, 26, 27, 28, 29, 31, 38, 41, 42, 43, are instances of such special provisions. It was indee

urged, in the course of the argument, that this particular reason might be retorted ; and the 10th and 18th sections of the Act were mentioned as containing express reference to contracts made *before* as well as after the Act. But I think the reason of this is to be found in the reference contained in those sections to the date of the 1st of June 1826, which necessarily limits their application *a parte ante* to a particular class of leases ; and if the Act, in its general forms, be, as it seems to me it is, applicable to *all* antecedent leases as well as all subsequent, a departure from the general forms would here be required.

As to the 8th section, which was also mentioned, what is there expressly referred to as "made before or after the Act," is obviously "the surrender," not "the lease ;" and as in general, as well as from the repealing clause, it seems to me clear that the statute is not retrospective as to acts done by the parties to antecedent contracts, under or in relation to those contracts, particular provision would be necessary in any case in which it was intended that it should have that effect.

I am very much led to the same conclusion by the very form of the 3rd section, which is not that of a definition of the relation of landlord and tenant, for the mere purpose of the interpretation of the Act, though the 1st section contains such definitions ; but is a statement of the law by which, ever thereafter, that abstract thing, "the relation of landlord and tenant," shall be understood.

It is true that the future tense of the verb-substantive is used in indicating the agreements to which, according to its new constitution, the relation is to be applied ; but this use appears to me suggested by the form of legislation : for there obviously cannot be an agreement, whether made before or after the Act to which the relation in its new state shall be applied, until after the Act. It can have no existence, for the purpose of being so understood, until then.

I am further led to the same conclusion, by considering particular parts of the Statute Law left unrepealed. Thus, the 4th section of 25 G. 2, c. 13 (*Ir.*), which gives to a landlord, in cases between landlord and tenant, a general avowry in replevin, is unrepealed. It is well known that the House of Lords held that, without rever-

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sion or tenure, this statute was not available by a party distraining. In the statute of 1860 there is not, I think, any section which gives the landlord, according to the new relation, a general avowry. I think it can hardly be doubted that, in leaving this section of the Act of G. 2 unrepealed, while other sections of the same Act are repealed, the Legislature intended that the new relation which it constituted should retro-act on the unrepealed provisions, and that the general avowry should be available in cases between landlord and tenant, according to the new constitution of that relation. But, if so, I think it could hardly have meant that this unrepealed section should be read in one meaning as to contracts antecedent to the Act of 1860, and in another as to contracts subsequent.

I acknowledge the presumption against retrospective legislation, but it must yield to intention sufficiently manifested; and it will yield more easily in the case of a statute in which, as here, the retrospective effect, to a *certain extent* and in *particular instances*, is strictly guarded against.

On these grounds, I am of opinion that the Act, and in particular the 3rd section, which, in truth, seems designed as a new basis, not only of this statute, but of the whole law of landlord and tenant, does apply to contracts made previous to its passing.

As to the second proposition, I am, though after some hesitation, also of opinion that the Act does apply to grants in fee at a rent.

It seems to me that these are as much agreements by one party to hold land from another at a rent, as any other grants at a rent which create no tenure—reserve no reversion, and have no rent service. Though it may be difficult to put any other meaning on the term “tenure” than “the relation of landlord and tenant,” yet the relation of landlord and tenant with which this statute intended to deal seems to me to be that only of which rent constituted an element, and of which therefore tenure before the Act may, in some sense, be said rather to have been the foundation than the whole. The statute does not therefore abolish tenure, nor put tenure in general on a new footing; but it attaches to contract, in a particular class of cases, many incidents which before were incidents of tenure. Tenure, in the case of a grant in fee, is now, I think as it was

before the Act, governed by the statute of *Quia Emptores*. It is not of the immediate grantor, but of the Crown or next superior lord; and with its former consequences of escheat, and the like.

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The 25th section of the Act exempts expressly from its operation fee-farm grants of a particular class. This seems to me hardly intelligible, if it were not intended that other fee-farm grants should be included in it. I may observe that this express exception was thought necessary, though a particular code of law, giving the remedies of landlords in cases belonging to the excepted class, is left unrepealed.

It is true that an important statute, giving, in the case of fee-farm grants in general, certain remedies of landlords, is left unrepealed; though the statute of 1860 gives such remedies expressly to landlords in general; but the unrepealed statute relates to *all* grants in which no reversion is reserved: and yet unquestionably there can be no doubt that such grants are within the general purview of the Act of 1860.

It is true that the 52nd section of the Act, which for the first time gives the remedy of ejectment for non-payment of rent, in the case of fee-farm grants mentions them expressly, in addition to "leases and other contracts of tenancy;" but it must be observed that it also expressly mentions tenancies from year to year; which are unquestionably leases or contracts of tenancy within its meaning. This 52nd section gives the statutable ejectment, in all cases within its terms, to "the landlord;" and unless that term be understood according to the provisions of the statute, there would be no landlord in the case of fee-farm grants, except the Crown or the next superior lord to the grantor.

Again, the 52nd section unquestionably does give the statutable ejectment for non-payment of rent to grantors in fee; but the 53rd section contains provisions almost essential to make the gift of any benefit. Now these provisions are available only "provided a *tenancy* between the parties *shall appear to exist*;" and the only way in which a tenancy can appear in the case of a fee-farm grant, between the grantee and grantor, is by holding such fee-farm grant to be within the purview of the statute.

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On the whole, I think the statute does in general apply to contracts made before it, and that fee-farm grants are within it; and consequently I think that the demurrer ought to be overruled, and judgment given for the plaintiff.

HUGHES, B., concurred with FITZGERALD, B.

DEASY, B.

I agree with Baron FITZGERALD that the judgment should be for the plaintiff.

I think the 3rd and 12th sections of the Landlord and Tenant Act apply to existing leases and contracts, and that fee-farm grants are included within their operation. Of the former I never entertained any serious doubt; but upon the latter I felt for some time very considerable difficulty.

I quite agree in the general principle expressed in the case of *Moore v. Durdan* (a), that a statute is not to be deemed retrospective, unless it is clearly shown on the face of it that the Legislature meant it so to operate. But the question here is, whether looking to the entire of the Act, to its scope and purport, and to the object the Legislature sought to effect by it, it has not shown clearly that it meant that the general provisions should apply to all leases and contracts of tenancy in existence at the date fixed for its coming into operation; or whether we ought to come to the conclusion that, as to those leases and contracts, the general provisions of the Act were never to have any effect. I think that, looking to the entire Act, it is plain, beyond reasonable doubt, that the Legislature meant that the general provisions of the Act should apply to all tenancies existing upon the 1st of January 1861. The Act recites that it is expedient to consolidate and amend the laws relating to Landlord and Tenant in Ireland. It then defines what the Legislature meant by those terms "landlord and tenant." It repeals, either actually or partially, thirty-nine Acts relating to the relation of landlord and tenant, beginning with the 14 *Edw.* 4, c. 1 (*Ir.*), and ending with the 14 & 15 *Vic.*, c. 57. It re-enacts most of the provisions

(a) 2 Exch. 22.

contained in the repealed enactments, some with and some without modifications; and it fixes a period at which it is to come into operation, namely, the 1st of January 1861. The object of the Legislature apparently was to codify the laws governing this important relation; to place within the limits of one Act all the provisions affecting it, which were scattered throughout the Irish and Imperial statute books, and to place them in a small compass, within the reach of every member of the community, under such improvements as in their opinion, experience had suggested. Are we to suppose that the Legislature intended that the existing generation of landlords and tenants were to be excluded from the enjoyment of the benefits thus intended to be conferred, and that as to them the Act was never to have any operation; but as to them the repealed enactments were to be still in force; and that they were to grope through the statute books for the provisions regulating their rights and liabilities? I think such a construction would defeat the object which the Legislature had declared having had in view, viz., consolidating and amending the laws relating to landlord and tenant; and, instead of that, would create two distinct states of law—one affecting contracts previous, and the other affecting contracts subsequent, to the passing of the Act. I cannot think that such is the true construction of the Act; particularly when I find that out of the one hundred and five sections of which it consists, seventy-five are expressed in general terms, neither retrospective nor prospective; twenty-four are expressly prospective; and six are both prospective and retrospective: and when I find, with respect to those latter sections, there are reasons which rendered it either necessary or advisable that they should be framed in those terms. Thus, giving that general construction to the provisions of the Act which are not expressly prospective, I can see no sufficient distinction between the 3rd and the 12th sections, and the other sections which are equally general. In the 3rd section, the Legislature appears to me to declare the principle which is for the future to be applied to those contracts of tenancy; which it proceeds to regulate more specifically in the succeeding sections, which are equally general. I can see no

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T. T. 1863. distinction between it and the 7th, which deals with future surrenders of existing interests, or the 11th or 16th sections, which deal with future assignments of existing interests, and which show that the Legislature meant to deal with such interests. Neither can I see any distinction between it and the 17th section, which deals with the subject of fixtures ; with the 23rd and 24th sections, which deal with the landlord's proofs in actions against his tenant ; nor between it and the sections relating to receipts, to distress, to set-off, to apportionment, to ejectments in the Superior and Civil-bill Courts, which, ever since the passing of the Act, have been uniformly considered to apply to tenancies, whether existing previous to the Act or created since.

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In this view of the general effect of the Act, I am supported by the case of *Mercer v. O'Reilly*. In that case the Common Pleas decided that the 44th section of the Act applied to, and governed, the rights of landlords and tenants under leases executed before the passing of the Act ; and the Court of Exchequer Chamber, though differing from the Common Pleas as to some points, unanimously agreed with them in their view of the application of the section to existing leases.

With respect to the second question, whether the provisions of the Act relied on by the plaintiff extend to fee-farm grants, I was at first disposed to think that they did not ; but, on further reflection, I have come to the conclusion that they do. They are included within the words of the 12th section ; and I do not see sufficient reasons for limiting the operation of those words, by reference to the other portions of the Act. The 12th section gives to every landlord, of any lands holden under any lease or other contract of tenancy, the same action and remedy against the tenant and the assignee of his estate and interest, in respect of agreements contained or implied in such lease or contract, as the original landlord might have had against the original tenant, or his heir or representative. Now the definition of landlord, in the 1st section, includes in it the person for the time being entitled in possession to the estate or interest of the original landlord, under any lease or contract of tenancy, whether he has a reversion or not ; and the

3rd section declares that the relation of landlord and tenant shall depend upon contract, and not upon tenure or service, and that a reversion shall not be necessary to such relation. The object sought to be effected by the Legislature apparently was to make the rights and liabilities of parties entering into contracts respecting land, like all rights and liabilities respecting other subjects, depend upon, and be governed by, the contracts they had entered into; and not to allow the enforcement of those rights and liabilities be defeated by the technical rules which the obsolete system of tenures had engrafted upon our law. They intended that when a party, giving land to another, required and obtained from him stipulations purporting to bind those deriving from him by assignment, that those stipulations should be binding on them; and a reciprocal provision is contained, in favor of the assignees of the tenant against the assignees of the landlord, in the 13th section. Now, one of the classes of cases in which the technical rules to which I have referred operated to defeat express contracts, was that in which there was no reversion to which the covenants could attach and be incident. Whenever that state of things existed, the covenant or contract, however formal, became, in effect, inoperative as against any but the parties to it, or their real or personal representatives. Another class of cases, in which the technical rules of the law operated to defeat the contract of the parties, were those in which the Courts held that, notwithstanding the existence of a reversion, the covenant, from its nature, did not run with the land. The object of the Legislature was to remove both classes of obstacles to the enforcement of contracts, and to make those contracts operate in the manner and to the extent which they purport to do.

I was at first struck with the arguments of the defendant's Counsel, founded on the omission to include, in the repealing clause, any of the Acts relating to fee-farm grants; and on the express specification of those instruments in the 52nd section, which gives the right to bring an ejectment for non-payment of rent. But, upon further consideration, I have satisfied myself that there were valid reasons, both for the omission in the repealing clause, and for the express mention of fee-farm grants in the 52nd section. The only

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Demurrer disallowed.

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## THE ATTORNEY-GENERAL v. CULLEN.

April 24, 25.

June 29.

THIS was an information filed to obtain payment of the duty which, it was alleged, had become payable to the Crown, in respect of a certain residue of personal estate, bequeathed by the will of Bridget Fitzgerald to the late Most Rev. Dr. Murray, formerly Roman Catholic Archbishop of Dublin, and the Rev. Patrick Doyle, both now deceased, and to the payment of which, it was alleged, the defendant, the present Roman Catholic Archbishop of Dublin, was liable as administrator *de bonis non* of Bridget Fitzgerald, and also as executor of the Rev. Patrick Doyle, the acting executor under the will of the testatrix. Bridget Fitzgerald's will, duly published, executed, and attested, was dated the 10th of February 1829; she thereby appointed Peter Locke and the Rev. P. Doyle her executors; she bequeathed to the former £200, to the latter £100. After various legacies, she gave the residue of her property, real and personal, to the Rev. P. Doyle and the Rev. Dr. Murray, and the survivor of them, his heirs, executors, administrators and assigns, requesting that all the intentions in that her last will and testament expressed might be fulfilled and carried into execution immediately, or as soon as conveniently could be, after her decease. From the information it further appeared that the testatrix made four codicils, in the years 1831, 1839, 1847, and 1849. These codicils only ratified her former bequest of the residue; and the latest of them substituted Ann Carroll as administratrix, in the place of Peter Locke deceased.

Bridget Fitzgerald died on the 5th of May 1850; and on the 18th of June following, probate of her will and codicils was granted to the Rev. P. Doyle and Ann Carroll. The former took possession of the assets of the testatrix, and undertook the burden of the

The exemption from legacy duty of "any legacy given for any purpose merely charitable," contained in the 5 & 6 Vic., c. 82, s. 38, applies only where the charitable purpose for which the legacy is given is described by and in the will. Therefore, when a testatrix bequeathed the residue of her real and personal property to A and B, and the survivor of them, his heirs, executors, administrators and assigns, and requested that the intentions expressed in her will might be carried into effect, without stating in the will what those intentions were, but, contemporaneously with the execution of the will, sent a letter to A and B, stating that she had made the bequest to them in the full confidence that they would found a convent for the education of

poor female children—*Held*, that the personal representative of A and B was liable to legacy duty upon the amount of the residue bequeathed.



**E. T. 1863.** execution of the will ; and, as the information charged, applied to  
*Exchequer.* his own benefit, or that of other persons, large sums of money,  
**ATTORNEY-** without paying legacy duty upon them. The Rev. Dr. Murray  
**GENERAL** died in the year 1852 ; and the Rev. Patrick J. Doyle died in  
**v.** the same year, the latter having made his last will, whereby,  
**CULLEN.** after giving some legacies, he bequeathed the residue of his property to the defendant, for such religious and charitable purposes as he should think fit ; he appointed the Rev. P. Dowley and the defendant his executors. Probate was granted to the latter, who took upon himself the burden of the will. Ann Carroll died in 1853 ; and letters of administration of the assets of Bridget Fitzgerald, unadministered by her, were granted to the defendant in 1854. The information then charged that no legacy duty had been paid by the defendant upon the residue of the testator's property ; and that the Rev. P. J. Doyle and the defendant had stated, in answer to applications made by the Commissioners of Inland Revenue, that the residue in question was exempt from legacy duty in consequence of being impressed into certain charitable trusts, declared in certain letters written by the testatrix to the Most Rev. Dr. Murray and the Rev. P. Doyle, who were thereby made trustees for certain charities.

The defendant, in his answer, set out the following letters (amongst others), and contended that a charitable trust was thereby impressed upon the residue, and that it had been so applied :—

“MY LORD—Deeming it right to have my temporal affairs  
 “arranged before the awful moment arrives when matters of  
 “greater moment should, and, I hope, through the grace of God,  
 “shall engross my mind, I have, on the 10th of February 1829,  
 “made, signed, and sealed my last will and testament, in the  
 “presence of proper witnesses. In my will I have appointed my  
 “relation and friend Peter Locke of Athgoe, and the Rev. Patrick  
 “Doyle of the Roman Catholic Church, and residing in the chapel-  
 “house of the church Marlborough-street, my executors. The  
 “high opinion I have of the Rev. P. J. Doyle, and of his zeal  
 “and rectitude, has induced me to nominate him one of my

"executors, in order that certain intentions of mine shall be faithfully complied with. In my will I have left, as a legacy for his own entire use, the sum of £100 sterling. After leaving other legacies, I have, in my said will, left him and you, my lord, my residuary legatees of my remaining property, after discharging my debts and the legacies I have left. Your Grace will be aware, by my leaving the residue of my property to you and the Rev. P. J. Doyle, I do so merely as a trust, that the property left to you may be disposed of in the manner and for the purposes I shall direct, thinking it better to do so than mentioning them particularly in my last will and testament, some part of them arising from a conscientious feeling. After my debts, legacies, and bequests are satisfied, and money mentioned to be given for masses for the repose of my soul, and what I have left for different charitable institutions, all of which I have particularly specified in my letter to my executor the Rev. P. Doyle, a copy of which I shall inclose to you, that you may more fully understand my intentions about what I wish to have done with the residue of my property.—After what I have mentioned in the directions I leave for you and the Rev. P. Doyle, the remainder of my property I wish should be laid out towards the foundation of a convent, for the education of female children of respectable parents reduced to poverty—an institution much to be desired. I would prefer a convent that would take the children to live in the house. If a convent were founded in Piercetown, county Westmeath, or the immediate neighbourhood of it, I should wish the property to be given to that convent preferably to any other. Should the Order of the Visitation be established in this county, I should prefer giving the property I have in trust to that order; provided they undertake to instruct the poor, and are bound to do so; and I would by no means leave my property to a convent unless it benefitted the poor. If a convent is, or can be, founded where I mentioned, the bishop of that diocese will necessarily be consulted in respect to the place that the convent shall be founded in. I leave you and my executor the Rev. P. Doyle a discretionary power to fix it wherever it is likely to promote the greater

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E. T. 1863. "glory of God; though my feelings lead me to have it in the place  
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 ATTORNEY- "mentioned. You will also have it so settled that the convent  
 GENERAL "so endowed shall say the office of the dead for me, my parents,  
 v. "and relatives, once a-year; and the acts of faith, hope, and charity  
 CULLEN. "every day for my soul. My lord, I should feel some reluctance,  
 "though one of your flock, to trespass upon your time about the  
 "immediate concerns of one not particularly acquainted with you;  
 "but being convinced of your religious zeal, I feel convinced you  
 "will joyfully undertake to act in any matter that may promote the  
 "salvation of souls. I hope what I desire to be done may promote  
 "the power and glory of my Redeemer Jesus Christ, through whose  
 "merits I hope for eternal life. My lord, having thus far explained  
 "the nature of the trust reposed in you and my executor the Rev.  
 "P. Doyle, in regard to making him and you my residuary legatees,  
 "I rest satisfied that I have reposed confidence in two persons of  
 "strict honor and integrity. I have the highest esteem for, and  
 "unbounded confidence in, my executor Rev. P. Doyle; for you,  
 "my lord, the greatest veneration and temporal blessing.—I remain,  
 "my lord, your most obedient, humble servant,

"BRIDGET FITZGERALD.

"26 Temple-street, Dublin, 10th February, 1829.

"To the Most Rev. Dr. Daniel Murray."

"Dublin, 26 Temple-street, 10th February 1829.

"REV. SIR—In my letter to you and the Most Rev. Daniel  
 "Murray, I informed you for what intention I left him and you,  
 "in my last will and testament, my residuary legatees; convinced  
 "that you and he would most carefully discharge the trust reposed  
 "in you. With this letter, you will receive a small leather trunk.  
 "In it there are five Government three and a-half per cent. debentures,  
 "with cash, as gold and silver, and some bank notes. This  
 "part of my property is a particular trust I repose in you; wishing  
 "the orders I shall specify respectively shall be done without delay.  
 "And I have ordered that no inquiries should be made by any person  
 "concerning it, but so give it to you unopened. You are not to  
 "consider yourself bound to account to any relative of mine for  
 "what I leave in trust with you in the trunk; which trust I leave

"for you to fulfil without any delay,\* particular intentions which I shall mention in this letter. E. T. 1863.

"There are some papers in the trunk, I believe useless; but if they are necessary, you can give them. The rest of my property is in Government new four per cent. stock, three and a-half per cent. stock, and some in another three per cent. fund, mentioned in an account-book. Rev. sir, entreating your fervent prayer for the repose of my soul, I shall enter on the nature of the confidence and trust I repose in you. I leave, for masses to be said by you for my soul, when convenient to you, the sum of £20 sterling. I also leave for masses, to be said immediately for the repose of my soul, the sum of £100 sterling, except £10, which is to be kept for masses to be said on the days of my anniversary. When the masses are to be said, I shall set down in this letter. I leave, as a fund towards the establishment of a female poor school, in the parish of Piercetown, county Westmeath, the sum of £100 sterling; this sum you will deposit with the bishop of the diocese, or any other way most likely to effect the purpose; the interest to accumulate until the establishment of the school. I leave to the said parish of Piercetown, county Westmeath, the sum of £10 sterling, for the sick poor of said parish. I leave to the sick poor of any parish I may die in, the sum of £10 sterling. If the religious ladies of the Clare Convent, Kingstown, late of the convent North King-street, should be there, I leave to the poor school under their care £10 sterling. I leave to the poor school, Arran-quay, £5 sterling." Then follow several small legacies to existing schools. The testatrix proceeded:—"If any convent or religious establishment should be placed over the poor school of Piercetown, and if any overplus remain of the money in the trunk after fulfilling what I have specified, I should wish it to be given towards a fund to enable a member to enter it; if not, to give it to any female, having a vocation, to enable her to enter a convent: but whether or not there be a convent at Piercetown, the £100 sterling is to be given there for a school, and to no other place;" &c. &c. "I shall feel grateful, rev. sir, for your

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\* *Sic.*

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 CULLEN. "and esteem, your most sincerely obliged, humble servant,  
 "BRIDGET FITZGERALD.  
 "To Rev. P. Doyle, Chapel-house, 77 Marlborough-street.  
 "I have inclosed a copy of this to the Most Rev. Dr. Daniel  
 "Murray, Mountjoy-square."

The *Solicitor-General*, *J. Brooke*, and *Jebb*, for the Crown.

The gift of the residue of the property, to the persons whom the defendant represents, was a legacy, as defined by the 5 & 6 Vic., c. 82, s. 38. This Court cannot look outside the express statement of the testatrix, contained in her will and codicils. No charitable trust is expressed in the will itself; therefore the bequest in this case does not come within the saving clause at the end of the above section.

The following cases were cited :—*Drakeford v. Wilks* (a); *Russell v. Jackson* (b); *Wallgrave v. Tebbs* (c); *Sharry v. Garty* (d); *Tee v. Ferris* (e); *Attorney-General v. Dillon* (f); *Pickard v. The Attorney-General* (g).

*Sir C. O'Loghlen* and *J. O'Hagan*, for the respondent, reviewed the history of the legacy duty, and cited 20 G. 3, c. 28. The definition of a legacy, as given in *Green v. Croft* (h); 36 G. 3, c. 52, s. 7; 55 G. 3, c. 184; 5 & 6 Vic., c. 82; 8 & 9 Vic., c. 74, s. 4. This case is analogous to a gift with a power: *Sweeting v. Sweeting* (i). As the Court will go outside the will for other objects, so it may here, to determine whether a charitable trust is created.

The following cases were cited :—*In re Wilkinson* (k); *In re*

(a) 3 Atk. 539.

(c) 2 K. & J. 313.

(e) 2 K. & J. 357.

(g) 6 M. & W. 348.

(i) 1 Dru. 331.

(b) 10 Hare, 204.

(d) 2 Ir. Chan. Rep. 351.

(f) 13 Ir. Chan. Rep. 127.

(h) 2 H. Bl. 33.

(k) 1 C. M. & R. 142.

*Pearce (a)*; *Langham v. Sanford (b)*; *Moss v. Cooper (c)*; *E. T. 1863.*  
*Lomax v. Ripley (d).*

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*Jebb*, in reply, cited *In re Evans (e)*; *Gough v. Findon (f)*;  
*In the goods of M'Cabe (g)*; *Powerscourt v. Powerscourt (h)*;  
*Attorney-General v. Bagot (i).*

PIGOT, C. B.

The *Solicitor-General*, in opening this case on the part of the Crown, stated (very properly in my opinion) that he did not mean to controvert the proposition, relied upon in the answer, that the two residuary legatees of the residue bequeathed to them by the testatrix were trustees for the purposes indicated in the letters, dated contemporaneously with the will, and transmitted to them by the testatrix. The cause was set down to be heard, and has been heard, on the information and answer. The statements in the answer must therefore be taken as admitted. The answer states, not only that the two letters addressed by the testatrix to the Rev. Patrick Joseph Doyle, one of the residuary legatees, and the letter addressed to the Most Rev. Doctor Murray, the other residuary legatee, were transmitted to and received by them in the lifetime of the testatrix, but that copies of the letters addressed to the Rev. Mr. Doyle were transmitted to the Most Rev. Doctor Murray, and a copy of the letter addressed to the Most Rev. Doctor Murray was transmitted to the Rev. Mr. Doyle: that, in the testatrix's lifetime, both the residuary legatees accepted the trusts declared in those letters; and that those letters, remaining in their possession after the death of the testatrix in 1850, were found among their papers after their respective deaths. The answer further states that, after the death of the testatrix, the Rev. Mr. Doyle acted, with the assent of Doctor Murray, in

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(a) 24 Beav. 49.

(b) 17 Ves. 435.

(c) 1 John. & H. 352.

(d) 3 Sm. & Gif. 48.

(e) 5 C. M. & B. 205.

(f) 7 Exch. 48.

(g) 31 Law Jour., Probate, 190.

(h) 1 Moll. 616.

(i) 13 Ir. Com. Law Rep. 48.

T. T. 1863. applying the property bequeathed to them in conformity with those trusts; that they did not claim any benefit for themselves in reference to that property; and that the defendant, who is the executor of the surviving residuary legatee and the *administrator de bonis non* of the original testatrix, claims no benefit under her will, admits that he holds the remaining portion of the residue as trustee, and now claims exemption from the legacy duty on the very ground that the residuary legatees took the property as trustees.

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Although some reliance was placed, in the reply, upon the codicil of the 7th of October 1839, as a testamentary document annulling the trusts created by the letters and by the acceptance of the trusts by the residuary legatees, it appears to me that the evidence conclusively establishes that the trust continued to be reposed by the testatrix, and to be accepted and adopted by the legatees after that codicil, and to have been wholly unaffected by it. It is hardly necessary to refer to the authorities on the subject of trusts of this nature; almost all of them are collected in *Lomax v. Ripley* (a); *Wallgrave v. Tebbs* (b), and *The Attorney-General v. Dillon* (c). The rule is thus enunciated by the Vice-Chancellor, in *Wallgrave v. Tebbs* (d):—"Where a person, knowing "that a testator, in making a disposition in his favor, intends it "to be applied for purposes other than his own benefit, either "expressly promises, or by silence implies, that he will carry "the testator's intention into effect, and the property is left to "him upon the truth of that promise or undertaking, it is in "effect a case of trust." In the codicil of the 7th of October 1839, the testatrix, after indicating her desire to remove any doubt as to her intention as to the devise and bequest of her real, freehold and personal estate, uses these words "I hereby "declare that the same shall go to the Rev. Patrick James Doyle "and the Most Rev. Daniel Murray, named in my will, according "to the direction therein, and that it is not intended to be be- "queathed or given to any other person." It appears, strangely

(a) 3 S. & Gif. 48.

(b) 2 K. & J. 313.

(c) 13 Ir. Chan. Rep. 127.

(d) 3 K. & J. 322.

enough, that she twice misnamed, or inadequately named, the Rev. Mr. Doyle. In the will, and in the letters addressed to him, she named him as the Rev. Patrick Doyle. In the codicil of the 7th of October 1839 she designated him as Patrick *James* Doyle. And in the codicil of the 24th of January 1849, she corrects the error which she had made in the codicil, and states, that he "should have been described as *Patrick Joseph Doyle*" (which appears to have been his true name), and declares that "he is the person whom I appoint one of my executors and joint residuary legatee, and the Most Rev. Daniel Murray, Roman Catholic Archbishop of Dublin." If I were to express an opinion as to the motive and purpose of the testatrix in making the codicil of the 7th of October 1839, it would be that she intended to describe Patrick *James* Doyle as the person whom, under the name of *Patrick* Doyle she had made, by her will, joint residuary legatee with Doctor Murray. Whatever may have been her motive, the words which she used had no further efficacy, in disposing of the property, than those of her will. The bequest in the will was to the Rev. Patrick Doyle and the Most Rev. Doctor Murray. That in effect was a bequest to them, and to no other person. The words of the codicil, indicating that the legatees named, and they only, shall take under the will, are not stronger or more exclusive than those of the will in *Sharry v. Garty* (a). The main object of the trust was, not to bestow any part of the fund upon any specified person; it was to found and establish an institution of a specified kind, for the purpose of educating, in a specified way, a specified class of the poor. But irrespectively of any criticism on the terms of the codicil of the 7th of October 1839, the fact that the testatrix, during the rest of her life—a period of nearly eleven years—left the letters, unwithdrawn, in the possession of the residuary legatees; that they retained those letters until their respective deaths; and that they acted in the performance of the trusts which those letters purported to create, lead irresistibly to the inference that the trust was treated after the codicil, as well as before, by the testatrix and the legatees, as imposing a continuing and binding obligation to

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(a) 2 Ir. Chan. Rep. 351.



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take the property at her death, not for their own benefit, but upon the terms of the letters which they so retained.

The main question which we have to determine is, whether the legacy duty attaches to this bequest of the residue, or whether it is exempted by the proviso in the 38th section of the 5 & 6 Vic., c. 82, exempting charitable bequests from duty. It is contended, on the part of the defendant, that the legacy duty does not attach, because this is a bequest for purposes within the scope of the proviso. On the part of the Crown, it is not denied that the purposes are within the scope of the proviso; but it is contended that the purposes of the legacy are not within the exemption created by the proviso, because the legacy is not given *for those purposes by the will*.

The defendant's Counsel (by whom this case has been argued with great ability) have contended that the Court ought here to resort to matter *dehors* the will, to ascertain the purposes of the legacy, with a view to determine whether it is at all chargeable with duty; upon the same view of the proviso upon which they must resort to matter *dehors* the will to ascertain what is the amount of duty chargeable (for example) in determining whether the legatee does or does not stand in such a relation to the testator as renders him liable to duty less than that which would be payable by a stranger; or to determine—(as in *Sweeting v. Sweeting* (a))—whether a provision, created by an appointment under a power given by a will, was or was not chargeable with legacy duty as if given directly by the will. Cases have been suggested, in which evidence, extrinsic of the will, must confessedly be resorted to for the purpose of determining with what duty the legatee shall be charged in respect of the legacy. If there be a bequest of £1000 to A B, who claims to be the testator's son, and it be disputed that he stands in that relation to the testator, the amount of the duty may depend upon the legitimacy of the legatee. If there be a legacy to C D, who claims to be the testator's widow, the amount of the duty may depend upon the validity of the claimant's marriage. It is contended that the question, whether the purposes of the legacy are within the proviso exempting charitable bequests

(a) 1 Drewry, 331.

from duty is an inquiry as much within the contemplation of the statute as an inquiry whether the legatee is the legitimate son, or was the lawful wife, of the testator, or whether the appointee under a power takes a legacy under the provisions of the Act of Parliament. I confess I have not come, without doubt and hesitation, to the conclusion that these analogies do not furnish a safe rule for construing the exemptory proviso of the statute. The answer to the argument founded upon them appears to me to be furnished by the terms of the schedule to the 55 *G. 3*, c. 184, and by the terms of the 38th section of the 5 & 6 *Vic.*, c. 82, and the 4th section of the 8 & 9 *Vic.*, c. 76, indicating (though not exclusively defining) what shall be deemed a legacy within the meaning of the Acts granting duties on legacies. The schedule to the 55 *G. 3*, c. 184 (extended to Ireland by 5 & 6 *Vic.*, c. 82) "where any such legacy "or residue, or any share of such residue, shall have been *given to, or have devolved to or for the benefit of* a child of the deceased," &c., imposes "a duty at or after the rate of £1 per centum on the amount or value thereof." Then, after several other sections or paragraphs of the schedule, comes this section:—"And where any "such legacy, or residue, or share of such residue, shall have been "given, or have devolved to, or for the benefit of, any person in "any other degree of collateral consanguinity to the deceased than "is above described, or to or for the benefit of any stranger in blood "to the deceased, a duty at and after the rate of £10 per centum "on the amount or value thereof." The 38th section of the 5 & 6 *Vic.*, c. 82, and the 4th section of the 8 & 9 *Vic.*, c. 76, correspond very nearly in terms. The former enacts that, "Every gift by any "will or testamentary instrument of any deceased person, which, by "virtue of such will or testamentary instrument, shall have effect "or be satisfied out of the personal estate of such person so dying," (*inter alia*) "shall be deemed and taken to be a legacy within the "true intent and meaning of this Act." The 4th section of the 8 & 9 *Vic.*, c. 76, contains (with others), a provision in nearly similar terms, applicable to all the several Acts granting or relating to duties on legacies in Great Britain and Ireland respectively. The proviso at the end of the 38th section of the 5 & 6 *Vic.*, c. 82,

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T. T. 1863. *is*, "that nothing herein contained shall extend, or be construed  
*Eschequer.* "to extend, to charge with duty in Ireland any legacy *given*  
 ATTORNEY- "for the education or maintenance of poor children in Ireland,  
 GENERAL "or to be applied in support of any charitable institution in  
 v. "Ireland, or for any purpose merely charitable." These provi-  
 CULLEN. sions contain, in terms, the following as express enactments of  
 the Legislature: first, that a *gift by will*, which, *by virtue of*  
*the will*, shall be payable out of the personal estate of the testa-  
 tor, shall be deemed to be a legacy: secondly, that the duty of  
 £10 per cent. shall attach, wherever any such legacy shall have  
 been given or devolve to, or *for the benefit of*, any person who  
 shall be a stranger in blood to the testator: and thirdly, that  
 the exemption provided at the close of the 38th section of the  
 5 & 6 Vic., c. 82, shall apply where the legacy is "*given for*"  
 some of the purposes mentioned in the proviso. What then is  
 the true meaning of the words "*given for*," in connection with  
 the words which describe the purposes exempting the legacy from  
 duty? Do they mean that the legacy, in order to be so exempted,  
 shall be given for those purposes *by the will*? Or do they mean  
 that if the legacy be given by the will, the purposes may be  
 shown by matter extrinsic of the will? In other words, is it  
 a legacy given for those purposes, unless the will by which it  
 is given discloses the purposes for which it gives them? I come  
 to the conclusion, that such is the true construction of the Act  
 of Parliament, and that the exemption does not exist, within  
 the proviso, unless the purposes are so disclosed by the will as  
 to show that the legacy is "*given for*" those purposes. The  
 statute deals with what is done by the will. That is a legacy  
 within the statute, which is a "*gift by*" the will, and which is  
 to "*have effect*" or "*be satisfied*" "*by virtue of the will*." And  
 though the interpretation of the term "*legacy*" given by the  
 38th section of the 5 & 6 Vic., c. 82, and the 4th section of  
 the 8 & 9 Vic., c. 72, is not exclusive, and only professes to  
*include* within that term what it describes, yet it shows that  
 the Legislature contemplated (as indeed they obviously must have  
 done) the will as that which should determine what should be

a legacy to be dealt with under the statute. Construing the proviso by the language thus employed, I am unable to give to it the import contended for by the defendant's Counsel.

I am sensible that the words are large enough, if not contracted by the context, to embrace a bequest for any of the purposes specified in the proviso, howsoever that purpose may be proved; and I am sensible also that the construction for which the Crown contend may possibly furnish the means of evading duty, by making bequests to relatives upon secret trusts for strangers, under circumstances in which the Crown may not easily discover the trust, or may be unable to establish, by legal evidence, an intention to defraud the Crown of the duty. It is quite possible also that the Legislature, having before them the established rule of the Courts of Equity, which formed, in effect, a part of the law of the land, may have intended to comprise trusts "engrafted by that rule on the legacies" (to use the language of some of the Judges); and the expressions, in the several sections of the schedule, "where such legacy," &c., "shall have been given, or have devolved to, or for the benefit of, any person," might be considered sufficient to include a trust for a person not named in the will, created by an undertaking, from the legatee to the testator, to hold the legacy in trust for that person. This view may be considered as deriving some color from the rules laid down expressly in some of the cases, that the legacy duty shall be payable by, or at the expense of, the person who is beneficially entitled to the legacy: *In re Wilkinson* (a); *Attorney-General v. Nash* (b). Notwithstanding these considerations (which I mention for the purpose of showing that they have not been overlooked), I feel constrained to hold that this is not a legacy *given* for a charitable purpose *by the will*; and that, not being so given, it is not within the proviso, creating an exemption from duty, contained in the 38th section of the 5 & 6 Vic., c. 82.

The result is, that there must be a decree in conformity with the prayer of the information.

(a) 1 C. M. & R. 142.

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(b) 1 M. & W. 237.

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I have not, as I have already intimated, come to the conclusion at which I have arrived without considerable doubt, and some fluctuation of opinion. I should, speaking for myself, not regret that some inexpensive mode might be adopted for reviewing our decision, if not acquiesced in. The case of *In re Wilkinson* (a), decided in the Court of Exchequer in England, was brought (I presume, by consent between the Crown and the party claiming an exemption from legacy duty), in the shape of a special verdict, before the Judges of the Court of Exchequer Chamber, and the decision in that Court is reported under the name of the *Attorney-General v. Nash* (b). In that case the exemption was claimed on the ground that the bequest (which was for charitable purposes, and was to be distributed, under the will, in very small sums) was within the limits within which, under the 55 G. 3, c. 184, legacies were not chargeable with duty: and the amount of duty claimed did not differ much from the amount claimed in the present case by the Crown.

FITZGERALD, B.

I am also of opinion that the gift of the residuary estate, contained in the will of the late Bridget Fitzgerald, is subject to legacy duty.

I wish to be understood as offering no opinion on the question whether or not the trust, with which, it is alleged on the part of the defendant, that such gift was effected, could or could not be enforced. Even on the assumption that it could, and that it could be considered as a trust for the education or maintenance of poor children in Ireland, or for the support of a charitable institution in Ireland, or for a purpose merely charitable, I am of opinion that it is not a legacy, within the Stamp Acts; because it is not a gift by a will or testamentary instrument.

The only gift by will or testamentary instrument is the gift of the residuary estate to the residuary legatees; and no trust, as to application of that residue, is inferred or can be gathered from the will.

(a) 1 C. M. &amp; R. 142.

(b) 1 M. &amp; W. 237.

I wish further to be understood as offering no opinion as to the terms which a Court of Equity may, or not, have it in its power to impose on parties seeking, through its aid, to avail themselves of the several part of a legacy given by will, with the view of evading the higher amount of legacy duty to which the *cestui que trusts*, if legatees, would be liable. It may be (I am far from saying that it is so) that a Court of Equity may have a right to say to such parties—You shall not avail yourselves of a several part, though not testamentary, to escape legacy duty.

In the present case it is sufficient to say that, under the provisions of the statute, a several part, not testamentary, cannot be made available by the legatee for the purpose of exemption from legacy duty; and I cannot say that I entertain any doubt on the point.

DEASY, B., concurred.

HUGHES, B., expressed no opinion, as he had not been present during the whole of the argument.

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MEGARRY, *Appellant*; M'CULLAGH, *Respondent*.

June 5.

THIS case came before the Court upon a case stated by way of appeal from a conviction by the Magistrates sitting in Petty Sessions at Ballybay, county Cavan.

The facts appear at length in the judgment of the LORD CHIEF BARON.

*J. Frazer* and *J. E. Walsh*, appeared for the appellant.

*J. M'Mahon* and *R. Dowse*, appeared for the respondent.

PIGOT, C. B.

This is an appeal from a conviction before Magistrates, in a penalty of 10s., under the 25 & 26 *Vic.*, c. 76, s. 13; and it is

The deductions prohibited in the 13th section of the 25 & 26 *Vic.*, c. 76 (the *Weights and Measures (Ireland) Amendment Act 1862*), are deductions from the *weight*, not the *price*, of any article sold by weight.

T. T. 1863. presented in the form of a special case, for our opinion, by the  
*Eschequer.* Magistrates.

MEGARRY  
 v.  
 M'CULLAGH. We are of opinion that the conviction cannot be sustained.  
 The complaint in the summons was, "that the defendant, having  
 "contracted with the complainant for the purchase of a quantity of  
 "flax, by weight, and the true weight of said flax having been  
 "ascertained, pursuant to the Weights and Measures (Ireland)  
 "Amendment Act 1862; and the said quantity, so ascertained,  
 "having been delivered by complainant to defendant, as such pur-  
 "chaser, he the defendant, under a certain pretext, claimed and  
 "made a deduction or allowance *from said weight*, same not being  
 "for the weight of any sack, bag, cask, firkin, or other covering of  
 "said flax; and paid complainant short; whereby said defendant has  
 "incurred a penalty of £5." Three witnesses were examined for  
 the complainant. Their evidence was, in substance, to the follow-  
 ing effect:—The defendant bought from the complainant, at the  
 fair of Ballybay, a quantity of flax, at the price of 8s. 6d. per  
 stone. The flax was taken to the defendant's stores, where it was  
 weighed. The weight of the flax was ascertained to be thirty-five  
 stone; and for this a ticket was given to John Frazer, the person  
 who, after the bargain, took the flax to the store of the defendant.  
 The price of the thirty-five stone of flax, at 8s. 6d. per stone, was  
 £14. 17s. 1d. The person who acted for the defendant paid Frazer  
 £14. 14s. 6d. only; and when the defendant was applied to, and  
 told that he had paid about 3s. short, he replied that it was the  
 custom "to deduct a penny a-stone for storage," and "that he would  
 pay no more." No more was ever paid for the flax to the com-  
 plainant.

Some evidence was given for the defendant; but it is stated, in  
 the case presented to us by the Magistrates on the appeal, that, as  
 to the facts of the transaction, it corroborated the testimony of the  
 complainant; and it is not set forth by the Magistrates.

Upon this evidence, after overruling some objections, to which it  
 is unnecessary to advert, the Magistrates adjudicated, as stated by  
 them in the special case, as follows:—"Further, that it being

"thereby proved, and not contradicted, that a deduction of one penny per stone was made by the defendant from the complainant; further, having regard to the 13th section of the before-mentioned 25 & 26 Vic., c. 76, which recites that no deduction be made 'on any other account, or under any other name whatsoever,' and closing with 'on any pretext whatever,' we considered it applicable to this matter: consequently, that the said summons was properly brought; that the evidence brought the case within the operation of the statute. We therefore give judgment against the defendant, as aforesaid."

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It is quite plain that the Magistrates acted upon the construction of the 13th section of the 25 & 26 Vic., c. 76, for which the respondent's Counsel contended before us—namely, that although the goods were duly weighed, and the weight of them was ascertained between buyer and seller, in conformity with the Act of Parliament, the penalty was incurred by the defendant's deducting, not from the weight of the goods, but from the price of them, as determined by the ascertained and undisputed weight, a certain sum, by reason or under pretence of an alleged custom, to withhold a penny a-stone out of the price.

We think this is an erroneous construction of the Act of Parliament.

The statute begins by a recital of its general purpose, which was to amend the Act of the 23 & 24 Vic., c. 119, entitled "An Act to Amend the Law relating to Weights and Measures in Ireland." The enactments of this statute (25 & 26 Vic., c. 76) are then divided into three distinct parts; and in no part of it is any provision made in reference to the price to be paid upon any bargain, or in reference to any portion of the dealings between buyer and seller, save what relates to the weighing of the goods. With respect to the weighing of the goods, the enactments are contained in the 12th and 13th sections. These are preceded by a preamble, which furnishes a key to their meaning:—"And whereas it is expedient to abolish all local and customary denominations of weights, and to prohibit improper deductions *in weighing*, and otherwise to regulate the mode of weighing articles sold." The 12th section then



T. T. 1863. provides that every contract, bargain, sale, or dealing, for any  
*Eschequer.*  
 MEGARRY quantity of certain specified articles (including flax), or for any  
 v. quantity of any other commodity sold by weight (as described in  
 M'CULLAGH. this section), shall be made or had by certain denominations of  
 imperial standard weight (by the owner providing, &c.) avoirdupois, and not by any local or customary denomination of weight; and the 13th section provides "that every article sold by weight shall, if weighed, be weighed in full net standing beam; and for the purpose of every contract, bargain, sale, or dealing, the weight, *so ascertained*, shall be deemed *the true weight* of the article; and *no deduction or allowance* for tret or beamage, or on any other account, or under any other name whatever, *the weight* of any sack, bag, cask, firkin, or any other covering in which such article may be, only excepted, shall be claimed or made by any purchaser, on any pretext whatsoever; under a penalty not exceeding £5,"

The preamble of these sections shows that one of the purposes of them was to abolish all local and customary denominations of weight. That is done by the 12th section. Another purpose was "to prohibit improper deductions" (not in paying for, but) "*in weighing*," and otherwise to regulate the mode" (not of paying for, but) "*of weighing* articles sold." That is done by the 13th section. When the 13th section directs that, for the purposes of the contract, "the weight, *so ascertained*, shall be deemed the true weight of the article, and no deduction or allowance for tret or beamage, or on any other account, or under any other name whatever (*the weight* of any sack," &c., "alone excepted"), it plainly pursues the purpose indicated by the preamble, by prohibiting "*improper deductions in weighing*." The very context alone of the 13th section seems sufficiently to show such to be the meaning of those prohibitory words. It directs the weight, *so ascertained*, to be the true weight; and that no deduction, save those specified, shall be made. From what does it direct that such deduction shall not be made? Plainly from the weight, *so ascertained*. No reference whatever is made as to prices or money. The exception, and the terms in which it is framed, forbid any other construction—"the weight of any sack,

"bag, cask, firkin, or other covering in which such article may be, T. T. 1863.  
 "only excepted." The phraseology thus employed shows that what *Eschequer.*  
 the framers of the Act had in view was the weight ascertained; *MEGARRY*  
 and what they intended to prohibit was the deduction, out of that *v.*  
 weight, of anything except the weight of the vessel or covering in *M'CULLAGH.*  
 which the article sold and weighed was contained.

If the Legislature contemplated, in this statute, any other interference with dealings between buyer and seller than the regulating of weights, and the prescribing of the manner in which they were to be applied to contracts and dealings, it must, I think, be presumed that they would have done so in plain and explicit language. Their design, as expressed in the statute, appears to me to be confined to the regulation and use of weights. For that purpose, it was unnecessary for them to have gone further. The mischiefs which they sought to remedy were plainly the want of uniformity in the use of weights in various parts of Ireland, and the practice of making improper deductions in weighing. From these improper deductions, which, where the practice of making them prevailed, were liable to great abuse, and were capable of being made, to the prejudice of the sellers (especially those in humble life), the means of perpetrating deception and fraud, the provisions of the statute apply ample protection, if those provisions be obeyed. They provide that, in a large class of dealings, the articles sold shall be sold by weight, and by weight only. They provide that the weight of such articles shall be ascertained by uniform weights. They provide that from the weight, so ascertained, no deduction shall be made, save for the weight of the vessel or covering in which the article sold is contained: and, having done this, they leave to the seller the care of his own interests, to be maintained under the ordinary law of the land, by enforcing from the buyer the price of the article sold, which the statute provides the means of exactly ascertaining; or by withholding the possession of the goods, and refusing to deliver them until he is paid the full price which, by the weight, has been ascertained. In the present instance, if the complainant's allegations be well founded, the defendant has, so far as the weighing of the goods is concerned, complied with the Act of

T. T. 1863. Parliament; but the goods having been weighed, and the price *Exchequer.* having been ascertained, he has withheld a part of the price, in violation of his contract. If the defendant be right in *his* allegation, made at the Bar in this argument, and alleged by him when he paid the £14. 14s. 7d. instead of the £14. 17s. 1d., he was entitled to deduct the difference, by a custom prevailing in the place where the goods were sold, and so governing the contract. Whether he is or is not so entitled, is a question depending upon the existence and validity of the custom; and upon the fact (if fact it was) that the custom applied to the bargain for the sale of the goods in question.

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I do not think it could have been intended by the Legislature, that the liability to this penalty should depend upon such a controversy. It was alleged at the Bar, that evidence of such a custom was given before the Magistrates on behalf of the defendant. If we thought it necessary for the consideration and decision of the case to resort to that evidence, we should refer the case back to the Magistrates to set forth the evidence given before them on behalf of the defendant. But we do not think it necessary to do so. Whether there was or was not such a custom; if there was, whether the custom was good and lawful, or was unreasonable and illegal; if it was a good custom, whether it did or did not govern, in the present instance, the contract for the sale of the flax, are considerations wholly beside the question which we have to determine on this appeal.

We decide against the conviction, because we are of opinion that the Magistrates have proceeded upon an erroneous view of the Act of Parliament. They appear to have considered that the deduction or withholding of a part of the price was a violation of the 13th section, by which the penalty was incurred. We hold that the prohibition of the 13th section, and the penalty imposed by it, apply, not to a deduction from the price of the article sold, but to a deduction from the weight of the article weighed.

We have thought it necessary to be thus explicit in stating that the alleged custom has not entered into our consideration in determining the case, because it was stated at the Bar that a case is

now pending in another Court, in reference to the propriety of T. T. 1863.  
the deduction for which this penalty was claimed; and we are *Exchequer.*  
anxious to guard against the possibility of it being supposed that *MEGARRY*  
we at all considered the legality or illegality of the deduction or *v.*  
withholding of a part of the price of the article sold. Not only *M'CULLAGH.*  
did we not enter into that consideration, but there was, in this  
special case, no evidence whatever upon which any opinion could  
be formed of the legality, or even of the existence of the alleged  
custom, or of the legality or illegality of the deduction alleged  
to have been made in conformity with it.

It is unnecessary to advert to any of the other objections (some  
of them formal) which appear in the special case. The appellant's  
Counsel (very properly, I think) did not rely upon them in argu-  
ment.

M. T. 1861.

Queen's Bench

## MICHAEL WILLIAM ROONEY v. WILLIAM B. KELLY.\*

Nov. 21, 22,

23.

Dec. 2.

(Queen's Bench).

The proprietor of copyright in a book need not, in an action for the infringement thereof, aver that the defendant published the plaintiff's book. The plaintiff states a good cause of action if it avers that the defendant published *parts* of the plaintiff's book.

Such a cause of action is not answered by a plea in confession and avoidance, to the effect that the book of the plaintiff and the books of the defendant were composed by one and the same author, from common sources of information; and that no part of the defendant's said books, or of either of them, was copied or colorably altered from the said book of the plaintiff.

DEMURRER.—Action for an infringement of copyright.

The first paragraph stated:—"That the plaintiff, at and previously to the time of the committing of the grievances hereinafter mentioned, was, and thenceforth hitherto has continued, and still is, the proprietor of a copyright, then and during all that period, and still subsisting, in a certain book and volume intituled 'The Æneid of Virgil; first six books, as read in the Entrance Course T. C. D., Military Examination at Sandhurst, and the various Endowed Schools in Ireland, literally translated; with a brief memoir, by J. R. Mongan, ex-scholar, T. C. D.;" which said book and volume is hereinafter described as 'the said book of the plaintiff'. And the defendant, in that part of the British dominions called Ireland, during the time aforesaid, and after the passing of the 5 & 6 Vic., c. 45, did print and cause to be printed, for sale, divers *parts* of the said book of the plaintiff, without the consent in writing of the plaintiff, then being such proprietor, as aforesaid; the said *parts* of the said book of the plaintiff being so printed and caused to be printed as aforesaid, in each of a large number of copies of a certain book and volume intituled 'Mongan's Aldine Virgil; Virgil, the Æneid, books one to twelve complete; with English notes, explanatory and critical; also a metrical analysis of the Æneid; by Roscoe Mongan, A. B., ex-scholar, Trinity College, Dublin:' and also, in each of a large number of copies of a certain other book and volume intituled 'Virgil; the Bucolics, Georgics, and Æneid complete; with English notes, explanatory and critical; also a metrical analysis of the Æneid; by Roscoe Mongan.' And the defendant *thereby*

\* Before O'BRIEN, HAYES, and FITZGERALD, JJ.

"*pirated* the said *parts* of the said book of the plaintiff, contrary to "the said statute; whereby the said plaintiff has been prevented "from selling divers copies of the said book of the plaintiff, and his "profits in his said copyright have been diminished."

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Queen's Bench  
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The second paragraph, having stated the plaintiff's proprietorship of the copyright in the book described in the first paragraph as "the said book of the plaintiff," and that, during the period, &c., numerous copies of two books (which he described as "the said books of the defendant," and identified with those described in the latter part of the first paragraph), each of which copies contained, printed therein, divers *parts* of the said book of the plaintiff, were printed for sale, without the consent, &c., and contrary to the statute, averred that the defendant, afterwards in that part, &c., "well "knowing the premises, and without such consent, as aforesaid, and "contrary to the said statute, *did publish, and cause to be published,* "divers copies of the said books of the defendant respectively, each "copy containing, printed therein, the matters aforesaid; whereby," &c.—[Same statement of special damage as in the first paragraph.]

The third paragraph commenced exactly as the second; but the act of infringement therein complained of was that the defendant, well knowing, &c., "*did sell and expose to sale, and did cause to be sold and exposed to sale, divers copies,*" &c.—[Concluding as the second paragraph.]

The fourth paragraph also commenced exactly as the second; but the act of infringement therein set forth was that the defendant, well knowing, &c., and at divers times, and from time to time, "*had in his possession for sale divers copies,*" &c.—[Concluding as the two last paragraphs.]

The defendant filed three defences, which were severally pleaded to all the causes of action; and prefaced them by a commencement which was to be incorporated with each defence. That commencement stated that the books, described in each of the paragraphs of the plaint as "the said book of the plaintiff," are identical, and do not contain any part of the Latin text of any of Virgil's works; and that the books, severally described in the first paragraph of the plaint as, &c. [setting out the titles of the defendant's books], are

M. T. 1861. the same as the books described in the other paragraphs as "the  
*Queen's Bench* said books of the defendant;" "and that the first of said books of  
 ROONEY "the defendant consists partly of the Latin text of the *Æneid* of  
 v. "Virgil, and partly of English notes and of a metrical analysis of  
 KELLY. "the *Æneid*; and that the second of the said books of the defend-  
 "ant consists partly of the Latin text of the *Bucolics*, *Georgics*,  
 "and *Æneid* of Virgil, and partly of English notes and of a  
 "metrical analysis of the *Æneid*."

The first defence then traversed the plaintiff's proprietorship of the copyright in the said book of the plaintiff.

The second defence stated that "the entire of each of said  
 "books of the defendant (except the Latin text of Virgil's works  
 "therein contained) is a new and original work, the result of fair  
 "and *bona fide* mental labour and operation, exercised upon com-  
 "mon sources of information in respect of the subject-matter  
 "thereof; which said common sources of information were used  
 "by the author of said defendant's works in the composition  
 "thereof fairly, legitimately, and *bona fide*, and not colorably.  
 "And so the defendant says that the said books of the defendant  
 "are not, nor is either of them, an infringement of the copyright  
 "of the said book of the plaintiff."

The third defence stated "that one James Roscoe Mongan was  
 "the author, as well of the said books of the defendant, as of the  
 "said book of the plaintiff; and that said James Roscoe Mongan  
 "composed the said book of the plaintiff in the year 1855; and  
 "that the said books of the defendant (each of which is a work of  
 "a different character from the said book of the plaintiff) were  
 "composed by the said James Roscoe Mongan in the year 1860;  
 "and that the entire of each of the said books (save the Latin text  
 "therein contained) was so composed, partly from certain know-  
 "ledge, learning, and ideas which said James Roscoe Mongan then  
 "had in respect of the subject-matter of said work, and partly  
 "from common sources of information, which were, for that pur-  
 "pose, fairly and legitimately, and not colorably, used by the  
 "said James Roscoe Mongan; and every part of the said defend-  
 "ant's books (except the said Latin text) is and was the result of

"fair and *bona fide* mental operations of the said James Roscoe  
 "Mongan, upon said common sources of information; and that no  
 "part of the defendant's said books, or of either of them, was  
 "copied, or colorably altered, from the said book of the plaintiff;  
 "and so the defendant says that the said books of the defendant  
 "are not, nor is either of them, a piracy of the said book of the  
 "plaintiff, nor an infringement of the copyright therein; and there-  
 "fore he defends the action."

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To this third defence the plaintiff demurred, and noted many points for argument. In substance, they amounted to this:—That the third defence, while professing to be a plea in confession and avoidance, was merely a statement that a particular result had been arrived at in a particular manner therein described; but that the mode in which an act, *per se* illegal, was done, constitutes no justification of that act.

Thereupon the defendant took a cross-demurrer to the plaint; and in the argument mainly relied upon these two grounds—First, that each paragraph of the plaint merely alleges a publication, by the defendant, of *parts* of the plaintiff's book; but that, in order to state an infringement of a copyright, so as to disclose a good cause of action under the 5 & 6 *Vic.*, c. 45, each paragraph should allege that the defendant published *the plaintiff's book*; secondly, that the plaint tendered an immaterial issue—namely, whether the defendant's books contained *parts* of the plaintiff's book.\*

*Phillips* and Serjeant *Armstrong*, for the plaintiff.

The defendant has not attempted to traverse the allegation, which forms the substratum of each paragraph, namely, that each copy of each of the defendant's books contains printed therein *parts* of the plaintiff's book. The defendant however insists that the 5 & 6 *Vic.*,

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\* NOTE.—The plaintiff's book was a translation of the first six books of the *Æneid*, with some explanatory notes. The notes annexed to each of the defendant's books, so far as they were conversant with the first six books of the *Æneid*—and the plaintiff did not object to any others—were translations of the most difficult passages in the text, and were mere transcripts from the plaintiff's book.—  
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c. 45, makes it necessary for the plaintiff to allege, though contrary to the truth, that the defendant pirated the plaintiff's *book*, that is to say, the entire of the plaintiff's book; and that this plaint discloses no cause of action, because it only alleges a piracy of *parts* of the plaintiff's book. But the statute would be a nullity, if a man, nineteen-twentieths of whose book had been copied into the defendant's book, had no cause of action, because the remaining one-twentieth was left untouched. The piracy of *parts* of a book, in which copyright exists, does therefore constitute *per se* a *prima facie* cause of action; and the plaint is good if it charges the offence according to the real facts. The plaint need not go on to show that the defendant used those *parts* unfairly and colorably. That would be to anticipate a plea in confession and avoidance. Any matters, which amount to a legal excuse for an act which is *prima facie* an infringement of the plaintiff's copyright, should be pleaded by way of justification by the defendant himself. For instance, he may say—"True it is that I printed in my book certain parts of "yours; but I did so merely for the purpose of fair criticism and "quotation." The form of the plaint is unobjectionable; for, though the first section of the old Copyright Act (8 *Anne*, c. 19), in constituting the offence of infringement of a copyright, speaks of the book as a thing, entire and indivisible; yet the form of pleading, under that statute and under the old system of pleading, was to aver, if the facts were so, that the defendant had pirated parts of the plaintiff's book: *Cary v. Longman* (a); *Truster v. Murray* (b); *Mawman v. Tegg* (c). The last case approves of that form; and shows that an averment of the piracy of the plaintiff's book would not be sustained by evidence that *parts* only had been pirated, unless those parts were so inseparable from the remainder of the defendant's book that they could not be destroyed without destroying the original matter also. The 5 & 6 *Vic.*, c. 45, s. 2, makes the words "part of a book" equivalent to "book," so that even technically the defendant's objection is unfounded: for the words

(a) 1 East, 359.

(b) *Ibid*, 363, note.

(c) 2 Russ, 385.

"separately published" in that section do not refer to all their antecedents, but only to the last antecedents of a similar class, "map, chart, or plan." But, even since the passing of that Act, the form of this plaint has been recognised: *Sweet v. Benning* (a). In that case, the declaration was for pirating *portions* of a book, and yet no objection was taken to it. Therefore this plaint is good.

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The third defence is bad, because it neither traverses the averments in the plaint, nor confesses and avoids them. In the second defence, the defendant alleges that both his works are original. But, in the third defence, omitting the allegation of originality, he merely states that a particular result was arrived at by a certain mode. The mode in which the common author of the three works discharged his duty towards the defendant does not justify the defendant in pirating parts of the plaintiff's book. It would be quite consistent with the third defence, that the author had committed to memory the whole of, or the finest passages in the plaintiff's book, written them out, and then sold to the defendant the very thing which he had before sold to the plaintiff. The knowledge, learning, and ideas spoken of may have been the very same knowledge, &c., the result of which the author had sold to the plaintiff, five years before. Assuming, however, that the author's memory became a complete blank as soon as he had sold his first work to the plaintiff, and that he began *de novo* to use the common sources of information, and by that means composed the defendant's books, without having once referred to the plaintiff's book; still this defence would be no justification while it admits that certain parts of the defendant's books are exact reproductions of parts of the plaintiff's book. The good faith of the common author cannot shelter the defendant who, while saying that he used the common sources of information fairly, does not say that he used the plaintiff's book fairly, though he admits that parts of it are contained in his books. The mode in which a result is reached is of no avail, if the result itself is illegal: *Jarrold v. Houston* (b); *Reade v.*

(a) 16 C. B. 459.

(b) 3 K. & J. 708.

M. T. 1861. *Lacy (a)*; *Reade v. Conquest (b)\**; *Barfield v. Nicholson (c)*;  
*Queen's Bench Wilkins v. Aikin (d)*. "No Court of Justice can admit that an  
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 "mode of effecting it. If it is illegal, so must the contrivance  
 "be by means of which it was effected:" *Turner v. Robin-*  
*son (e)*.

*Palles* (with him Serjeant *Sullivan*), for the defendant.

The plaint is bad. The four paragraphs may be treated as one, because the allegation "and thereby pirated," &c., which occurs in the first paragraph, adds nothing to the cause of action. That allegation is a mere inference of law, from facts which ought to have been previously stated; and therefore cannot cure the defects of a plaint which, without it, does not disclose a good cause of action: *Seymour v. Maddox (f)*. Nor would the insertion of the word "wrongful" cure the defect: *Blood v. Keller (g)*. Putting that averment aside, the plaint only amounts to this—that, without the written consent of the plaintiff, the defendant printed in his books certain parts of the plaintiff's book. That act of the defendant does not *per se* constitute a cause of action under the statute, and copyright does not exist at Common Law: *Jeffreys v. Boosey (h)*. Piracy cannot exist unless there has been unfair copying or colorable alteration. Those additional facts must be set out in the plaint, in order to complete the statement of the cause of action. The onus of excuse does not lie on the defendant,

(a) 1 J. & H. 524.

(b) 30 L. J., N. S., C. P., 209; S. C., 9 C. B., N. S., 755.

(c) 2 Sim. & Stu. 1.

(d) 17 Ves. 422.

(e) 10 Ir. Chan. Rep. 510, 521.

(f) 16 Q. B. 326.

(g) 11 Ir. Com. Law Rep. 132.

(h) 4 H. of L. Cas. 815.

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\* NOTE.—The report of *Reade v. Conquest* in the 30 L. J. sets out only the second count to which the demurrer was taken, and which used the phrase "registered book"—speaking of it as an entire thing. But the report in 9 C. B., N. S., sets out both counts: and it is worthy of note that no demurrer was taken to the first count, which complained of an infringement of the plaintiff's copyright by the representation by the defendant of "divers parts of a certain play or dramatic piece."—REPORTER.

because the statute does not create an exemption in favor of the user of the plaintiff's book, or of parts of it, for fair criticism, or for any other purpose. In *Story's Eq. Jur.* (sec. 940), the distinction is taken between works entirely original—as was the case in *Reade v. Conquest* (a)—and those which consist only of knowledge previously existing in a different state. In cases belonging to the latter class the question is, whether the second work is nothing but a transcript of the first? *Sayer v. Moore* (b); *Trusler v. Murray* (c); *Cary v. Kearsley* (d); *Matthewson v. Stockdale* (e); *Wilkins v. Aikin* (f); *Martin v. Wright* (g); *Murray v. Bogue* (h); *Reade v. Lacy* (i); *Bramwell v. Halcombe* (k). That is a question for the jury; and a plaint, which merely charges that *parts* of the plaintiff's book appear in the defendant's books, without the written consent of the plaintiff, tenders an immaterial issue. For the fact that the translation of any two or three words, even though they could be translated in one way only, appeared in the defendant's books would satisfy this plaint. Yet that would not be an infringement of copyright; because the breach, under the 15th section of the statute, is the publication of copies of another man's *book*, not of *parts* only of the book. The issue raised upon that breach would raise the very question, whether the alteration was colorable? "Book," in section 15, means either an entire book, or "a part or division of a book separately published." "Book" is not synonymous with "part of a book," for section 18 speaks of them in contradistinction to each other; and "separately published" must refer to all the antecedents in section 2. There is no reason for confining them to "map, chart, or plan." In the cases cited, the question substantially left to the jury was, whether the copying amounted to a piracy of the whole book? The question, whether it was sufficient to aver that "portions" were pirated, was not argued

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(a) 30 L. J., N. S., C. P., 209; S. C., 9 C. B., N. S., 755.

(b) 1 East, 361, *note*.

(c) 1 East, 363, *note*.

(d) 4 Esp. 168.

(e) 12 Ves. 270.

(f) 17 Ves. 427.

(g) 6 Sim. 297.

(h) 1 Drew, 353.

(i) 1 J. & H. 524.

(k) 3 Myl. & Cr. 728.

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in *Sweet v. Benning* (a), which was a special case stated by consent. But the judgments of Cresswell and Crowder, JJ., on the second point, show that they exercised the functions of jurors; and did not decide the case merely upon the ground that certain passages in the two works were identical.

As to the point of evidence. The facts stated in the plaint are not even evidence to go to a jury, to prove a breach of the statute; for, if evidence is evidence of two states of facts, it cannot go to the jury in support of either point: *Avery v. Bowden* (b). Section 23 vests the property of the defendant's books in the plaintiff, if he recovers a verdict; and gives him an action of detinue to recover them. But in this case the verdict can only be that the defendant pirated *parts* of the plaintiff's book. Those *parts* could not be separately recovered in an action of detinue; and, if the plaintiff recovered the whole of the defendant's books, the defendant might, if this plaint is good, immediately sue him for an infringement of copyright by having in his possession for sale *parts* of the defendant's books.

If the Court is of opinion that the plaint is good, then the third defence is a sufficient answer to it. The first part of the third defence consists of two allegations; first, that no part of the defendant's books was taken from the plaintiff's book; and, secondly, that the defendant's books were taken from sources to which lawful resort might be made, namely, common sources of information. That is wholly inconsistent with the notion that the *parts*, which the plaintiff says have been pirated, were taken unfairly from his work; for the phrase "common sources" excludes every work in which copyright exists: *Lewis v. Fullarton* (c); *Jarrold v. Houlston* (d). Besides, even if that phrase was capable of two meanings, the Court must, upon demurrer, give it that meaning which will support the pleading: *Ruckley v. Kiernan* (e). Even though the defendant had not negatived the use in *any* way of the plaintiff's book, this defence would still be a valid

(a) 16 C. B. 459.

(b) 6 EL. & BL. 973.

(c) 2 Beav. 6.

(d) 3 K. & J. 708.

(e) 7 Ir. Com. Law Rep. 75.

answer, as the plaintiff does not allege an unfair user. The defence further states that no part was "copied" from the plaintiff's book. "Copied" means "taken either directly or indirectly:" *Reade v. Lacy* (a); *Murray v. Bogue* (b). "Colorable alteration" is also denied: and the demurrer admits that the user was fair, if any user there was; so that the Court has no right to say that the user was unfair. When an author does not contract not to write again upon the same subject, the purchaser gets nothing but copyright in the book, and the author retains a right to use the book, and all the sources from which it was composed, for every fair purpose in future. This defence is quite consistent with the supposition that the author had used only his memory in composing the defendant's book and had used it fairly, that is to say, had not given to the defendant anything *material* which he had formerly given to the plaintiff. "Copying" is essential to constitute a cause of action for infringement of a copyright: *Wilkins v. Aikin* (c); *Martin v. Wright* (d).

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Serjeant *Armstrong*, in reply.

It is sufficient that the plaintiff states a good cause of action substantially. It need not allege the piracy of the plaintiff's book; for, though the statute, under which alone copyright exists, uses the word "book" as an entire thing; yet the Common Law gives a remedy by action, independent of the statute, for every infringement of a statutable right. But this plaintiff is made quite conformable to the 15th section (supposing that no right of action exists except under that section), by introducing into it one of the definitions, "part of a volume," given in section 2; and then the plaintiff will be framed in the words of the statute. This plaintiff is good according to the form in 2 *Ch. Pl.*, 5th ed., p. 761: *Roworth v. Wilkes* (e). If the 15th section was not in the statute at all, still the previous sections create a right, and the Common Law gives a remedy for every infringement of that right. But

(a) 1 J. & H. 524.

(b) 1 Drew, 353.

(c) 17 Ves. 425.

(d) 6 Sim. 297.

(e) 1 Camp. 94.

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The defence is tricky, being neither a traverse nor a plea in confession and avoidance. *Reade v. Lacy* is express on the point that copying and printing are not the same. Copying is no test of infringement, for it goes only to the process, which is immaterial: *Turner v. Robinson (a)*.

*Cur. ad. vult.*

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O'BRIEN, J.

Dec. 2.

This is an action for the infringement of plaintiff's copyright in a book described as "the book of the plaintiff;" being a translation, by Mr. Mongan, of the first six books of the *Æneid* of Virgil, &c. The summons and plaint contains four counts, in which the plaintiff varies the statement of the acts complained of, as constituting the alleged infringement. In all of them, such acts are stated to have been committed after the passing of the Copyright Act (5 and 6 Vic., c. 45), and during plaintiff's proprietorship of said copyright, and without plaintiff's written consent. The first count charges that defendant printed, and caused to be printed, for sale, *divers parts* of plaintiff's said book, in each of a large number of copies of two several books of the defendant (one of defendant's said books being entitled "*Mongan's Aldine Virgil*," &c., and the other being entitled "Virgil; the Bucolica, Georgica, and *Æneid*, complete, with notes," &c.), and that defendant thereby pirated "*said parts*" of plaintiff's said book, contrary to said statute. The other three counts respectively state, in substance, the printing for sale, without plaintiff's consent, of numerous copies of defendant's said books, "each of them containing, printed therein, *divers parts* of plaintiff's said book;" and that defendant, with knowledge of the premises, and contrary to said statute, published, and caused to be published (as charged in the second count), and sold, or exposed for sale (as charged in the third count), and had in his possession for sale (as charged in the fourth count), *divers* copies of defendant's

(a) 10 Ir. Chan. Rep. 510.

said books, each of them containing, printed therein, said *parts* of plaintiff's said book.

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To this summons and plaint defendant has filed three several defences, each of them applicable to all said counts; and has pre-faced them by an introductory statement (as part of each of said defences), containing a more particular description of plaintiff's and defendant's said books. By the first defence, the defendant traverses plaintiff's proprietorship of said copyright. The second is a special defence, on which issue has been taken (and to which I shall hereafter refer); and the third defence is that to which the present demurrer has been taken.—[His Lordship read the third defence.]

During the argument, defendant's Counsel contended, not merely that the third defence was good upon demurrer, but that, even supposing it to be bad, defendant was still entitled to judgment upon the demurrer, by reason of the defects in the summons and plaint, all the counts of which, they insist, are bad, as not disclosing any sufficient cause of action. I shall therefore follow the order adopted by Counsel in the discussion of the case, and consider, *first*, the objections taken by defendant's Counsel to the summons and plaint; to which indeed the principal portion of the argument has been applied. Substantially, the objection is, that the copies of defendant's books, which defendant is charged by the several counts of the summons and plaint with having printed; and published; and sold, or exposed for sale; and had in his possession for sale; are not stated to contain *the entire* of plaintiff's book, but only *divers parts* of plaintiff's book; and defendant's Counsel contend that such a summons and plaint is not in accordance with the Copyright Act (5 & 6 Vic., c. 45); and that, although the fact of defendant's printing or publishing, &c., copies of his books, "*containing, printed therein, divers parts of plaintiff's book,*" might be an infringement of plaintiff's copyright, yet that plaintiff, in his summons and plaint, should state the acts complained of as having been done in respect of *plaintiff's book* generally, and should charge the defendant's books as containing, printed therein, "*the book of the plaintiff,*" instead of "*divers parts of the book of the plaintiff;*" and defendant's Counsel further contend that, at all events, and



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even supposing that the plaintiff might state, in his summons and plaint, that "*divers parts*" only of his book were contained, printed, in defendant's said books, it was incumbent on the plaintiff to show, in the summons and plaint, that, from the nature of the parts so printed, the acts complained of amounted to an infringement of plaintiff's copyright, and to a piracy of "*the book of the plaintiff*," instead of charging a piracy merely "*of part*" of said book.

In order to sustain their objection on these grounds, defendant's Counsel have argued, in the first place, that plaintiff's sole right of action is under the 15th section of said Copyright Act, which renders a party liable to a special action on the case for printing, publishing, or selling, &c., "*any book*" in which there shall be a subsisting copyright, without the written consent of the proprietor thereof; and that the present action must be considered as brought under that section, as all the counts of the summons and plaint refer to the statute, and state all the several acts therein respectively complained of to have been done "*contrary to said statute*;" and defendant's Counsel then contend that, by reason of the express terms of the 15th section, it is requisite, in order to maintain an action under it, that the summons and plaint should have stated that defendant printed, or published, or sold, &c., "*the book*" in which such copyright is claimed, and not merely "*divers parts*" of said book. They admit (what indeed could not, upon principle or authority, be denied) that the copyright in a book *might* be infringed by printing or publishing, &c., another book, containing only parts thereof; and in order to reconcile this admission with their argument on the construction and effect of the statute, they further contend that, though the summons and plaint should state "that defendant's book contained, printed therein, *the book* of the plaintiff," or "that defendant printed or published," &c., "*THE BOOK* of the plaintiff," and though it should appear, on the trial of the action, that defendant's book contained only "*parts*" of the book of the plaintiff, yet that plaintiff might sustain his action by showing, as matter of evidence, that having regard, not merely to the quantity, but the quality, of such parts, and also to the circum-

stances under which defendant's book was published, the printing, publication, or sale, &c., of it might fairly be regarded as being substantially a printing or publication of "*the book*" of the plaintiff, and being therefore an infringement of plaintiff's copyright. According to this argument, the word "*book*," in the 15th section, would receive a different construction, in dealing with the summons and plaint, and the statement therein of plaintiff's cause of action, from what it should receive at the trial, with respect to the evidence to be given to sustain such cause of action.

In answer to this argument, plaintiff's Counsel rely upon the definition of the word "*book*," contained in the interpretation clause of the statute, which enacts "that in the construction of "said Act, the word '*book*' shall be construed to mean and include "every volume, part or division of a volume, pamphlet, sheet of "letter-press, sheet of music, map, chart, or plan, *separately published*;" and they contend that the words "*separately published*," in this clause, refer only to the immediately antecedent words "map, chart, or plan;" and do not (as insisted by defendant's Counsel) refer to or control the preceding words "part or division of a volume;" and that therefore a part of a book, though not separately published, comes within the definition, and should accordingly be considered as included within the provisions of the 15th section.

This question has been much discussed during the argument; and though (for the reason I shall presently mention) we are not called upon to decide it, I may observe that, from other provisions of the statute, there appears to me great difficulty in holding that the word "*book*," *wherever* it is used in the statute, comprises and includes "*part of a book*." It would, for instance, be difficult to maintain that, under the 23rd section, the proprietor of the copyright in a book would acquire the property of all copies of another book, which contained, printed therein, a few pages or passages of his book. But the view which the Court takes, upon another part of the case, renders it unnecessary for us to decide this question; because we are of opinion that, independently of the 15th section, the proprietor of the copyright in a book may maintain an action for the

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infringement of such copyright; and that such copyright might be infringed by the printing, publication, &c., of another book, even though such other book contained, copied therein, only parts, but not the entire, of the proprietor's book. The 2nd section of the statute defines the copyright in a book to be "the sole and exclusive liberty of printing, or otherwise multiplying, copies of any subject to which the said word is herein applied;" and by the 3rd section the copyright is secured to the author, for the period therein mentioned.

Now it has not been contended (and indeed could not, with any color of reason) that the copyright in a book, which includes every part of the book, might not be infringed by the printing or publication, &c., of another book, merely because such other book contains, copied therein, not the entire, but parts only, of the proprietor's book. Supposing that the defendant's book contained, copied therein, nineteen-twentieths of the plaintiff's book (including perhaps almost all the material parts thereof), and left the remaining one-twentieth part uncopied, could it be said that this would not be an infringement of plaintiff's copyright, and an invasion of the right of the proprietor? It is true that, according to several cases referred to in the argument, copyright in a published work must be considered as a right created by statute, and not as one existing at Common Law: but it is clear that a Common Law right of action would attach upon any invasion of such statutable right, even though it be invaded by the printing, publication, &c., of only *a part*, but not *the entire*, of the proprietor's work, and though the remedy given by the 15th section did not extend to the case of such partial printing or publication, &c.

In the case of *Beckford v. Hood* (a), the plaintiff brought an action on the case, for the infringement of his copyright. The Court held that plaintiff's right was derived solely under the statute 8 *Anne*, c. 19, which was then in force; and it was contended that plaintiff had no further remedy than that given by said statute, which was for the recovery of penalties. But Lord Kenyon, in giving judgment, said:—"The statute having

(a) 7 Term Rep. 620.

"given that right to the author, the Common Law gives the remedy by action on the case, for the violation of it." That case is referred to by Mr. Justice Williams, in delivering the judgment of the Court, in *Reade v. Conquest* (a), as having decided "that a Common Law right of action attaches upon the invasion of the copyright created by statute;" and as having been followed in several other cases. The result of these authorities is, that if plaintiff's copyright has been in fact infringed by the printing or publication, &c., of only certain parts of his book, he has a right of action for such invasion of his statutable right, even supposing that the construction contended for by defendant's Counsel should be put upon the 15th section. It has been urged, as one of the grounds for holding this action to have been brought under the statute, that all the counts of the summons and plaint refer to the statute, and state the acts complained of as having been done "contrary to said statute." But, independently of the circumstance that the rights violated by those acts are given by the statute, we do not think that the insertion of those words would prevent plaintiff from maintaining his action at Common Law. In the case of *Boosey v. Tolkien* (b), which was also an action for infringement of a copyright, the first two counts were framed upon the statute, and contained similar words. The third count was framed upon the supposition that plaintiff was entitled to the copyright at Common Law: and the Court held that the third count should be struck out, as unnecessary; upon the ground that, notwithstanding the insertion of those words, plaintiff might assert his supposed Common Law right (if any) under the first two counts.

If then it be established that plaintiff's copyright might be infringed by the printing or publication, &c., of *parts* of his book, and that plaintiff might maintain an action for such an infringement, we have next to consider the other objections taken by defendant's Counsel to the frame of the summons and plaint. Now with respect to their suggestions that the summons and plaint should state the printing, publication, &c., complained of,

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(a) 9 C. B., N. S., 767; also reported 30 L. J., N. S., C. B., 209.

(b) 5 C. B. 477.

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as having been of plaintiff's *book* generally, although in fact only *parts* thereof were so printed and published, &c. ; and although they admit that plaintiff's action would not necessarily be defeated by such fact appearing in evidence at the trial, I cannot see upon what principle or authority it should be held necessary for plaintiff to state in his summons and plaint what it is admitted he could not and need not prove at the trial—such a course would be open to many objections; and no sufficient reason has been suggested for its adoption. But defendant's Counsel further contended that, as *parts* of a book may lawfully be copied, printed, &c., either for criticism, quotation, or for other legitimate purposes, it follows that such partial copying and printing, &c., is not necessarily an offence; and that accordingly the summons and plaint, complaining of it, should show that the parts so copied and printed, &c., and the nature of defendant's book, were such as to render the copying and printing, &c., of those parts, a substantial infringement of the copyright, and piracy of the entire book. And we have been told that "*very serious and alarming*" consequences would result from our holding that a summons and plaint, framed as that now before us, discloses a good cause of action in each count; as by doing so we should lay down the doctrine that in every case the copying, printing, &c., of *a portion* of a book, in which there was a subsisting copyright, would be an infringement of such copyright, and an actionable offence. We do not anticipate that any such consequences could follow from our decision. Though we are of opinion that the charge of copying and printing, &c., portions of such book amounts *prima facie* to a charge of an infringement of the copyright, and that therefore it is sufficient for plaintiff to state in his summons and plaint such *prima facie* cause of action, yet we also think that it is open for defendant, in his defence, to displace such *prima facie* charge, by showing that, either from the quantity and quality of such portions, or from the nature and character of defendant's book, the copying and printing, &c., of those portions were justifiable, and should not properly be considered as an infringement of the copyright. He might, for instance, show that the portions so copied were few

and immaterial, or he might state that such partial copying or printing, &c., was done for the purpose of legitimate criticism or quotation. He might also state (as in fact has been done by the second defence in this case), that defendant's book was a new and original work, the result of fair and *bona fide* mental labor, and operations exercised upon common sources of information, fairly and legitimately used in the composition thereof, &c.; or he might state other grounds upon which such partial copying, &c., would be justifiable. It is clear therefore that no such consequences as apprehended can follow from our decision.

We have been referred, during the argument, to several authorities. The result of them is, that a copyright *might* be infringed, and piracy committed, by copying or printing portions of a book; but the question whether, upon examining the several portions so copied, they are such as to render the copying of them an act of piracy, involves several considerations, it depends—as stated by Lord Cottenham in *Bramwell v. Halcombe* (a)—not merely upon the quantity but also upon the nature of those portions; so that it is difficult, nay almost impossible, to lay down any general rule upon the subject, defining how much exactly should be copied in order to constitute an act of piracy. Lord Cottenham, in reference to this question, said:—"When it comes to a question of quantity it must be very vague: one writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to. It is useless to refer to any particular cases as to quantity." He then refers to and approves of the opinion expressed by Lord Eldon in *Wilkins v. Aikin* (b), where he states:—"The question upon the whole is, whether this is a legitimate use of plaintiff's publication, in fair exercise of a mental operation, deserving the character of an original work." These cases, and the others to which we have been referred, show the principles upon which this question of piracy, by partial copying, should be decided. And in one of those cases—that of *Sweet v. Benning* (c)—the

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(a) 3 Myl. & Cr. 737-38.

(b) 17 Ves. 422.

(c) 16 C. B. 459.

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declaration was open to the objection relied on in the present case, namely, that the act complained of was stated to be the printing in defendant's book of "*divers portions*" of the plaintiff's book. This statement was indeed followed by a charge that "*defendant thereby pirated the plaintiff's book ;*" but it has been admitted, during the argument of this case, that the pleading, if bad in other respects, would derive no support from the insertion of those words, being a statement rather of a conclusion of law than of fact. And therefore the question of the sufficiency of the declaration was to be considered independently of those words. That action was brought by the proprietors of the "English Jurist" against the publishers of the "Monthly Digest." At the trial, the parties agreed to a special case, upon which it appeared that the act complained of was the copying and printing, in defendant's book, of the several head notes contained in the Jurist at the beginning of each case, giving a compendious statement of the decision. The case was argued at considerable length, and fully considered by the Court, which gave judgment for the plaintiff, upon the ground that, from the nature and importance of the portions copied, the copying of them amounted to a piracy of plaintiff's book. It is true that the objection now relied on, of the declaration stating only the printing of *portions* of plaintiff's book, was not taken in that case; but it is difficult to suppose that, if such objection was well-founded, it would have escaped the notice of the Counsel or the Court. A similar form of pleading was also adopted in other cases without objection; and it appears to us to be sustainable upon principle.

We are therefore of opinion that the summons and plaint is good; and upon the next question for our consideration, namely, the validity of the third defence, we are further of opinion that such defence is bad, and that the demurrer to it should be allowed. It is difficult to collect from this defence upon what precise legal grounds defendant thereby justifies his acts; and it was probably framed with that view. It admits (by not denying) the charges contained in the several paragraphs of the summons and plaint, that defendant "*printed for sale divers parts of plaintiff's book,*"

and "published, sold and had for sale, &c., defendant's two books *each containing printed therein divers parts of plaintiff's book.*"

Such acts as I have already mentioned would be an infringement of plaintiff's copyright, unless justified under some of the rules of law relating to literary property: and we are of opinion that the matters stated in this defence do not amount to any such justification. It has been argued by defendant's Counsel as if this was a defence on the grounds that defendant's books (excepting the Latin text) were new and original publications, the result of fair and *bona fide* mental operations upon common sources of information, &c. Such is expressly the ground of the second defence; but the third defence studiously omits the statement of defendant's books being new and original works. It states that Mr. Mongan was the author both of plaintiff's book and of defendant's books; and that the former was composed by him in 1855 and the latter in 1860. It also states that plaintiff's book and defendant's books were of a different character (a fact wholly immaterial in the present case); and it then goes on to state that the entire of defendant's books (except the Latin text) were composed by Mr. Mongan in 1860, partly from certain knowledge, learning and ideas which he *then* had in respect of the subject-matter, and partly from common sources of information, fairly and legitimately, and not colorably used by him for that purpose (without stating how much was composed from such knowledge and ideas, and how much from such common sources of information). It is of course to be assumed, for the purposes of this argument, that defendant's books were composed as stated in the defence; but it may also be assumed that plaintiff's book, composed in 1855, was in like manner the result of the knowledge, learning and ideas which Mr. Mongan *then* had upon the subject-matter thereof; and the defence does not state whether the knowledge and ideas, &c., which Mr. Mongan had in 1860, when composing defendant's books, were or were not the same knowledge and ideas, &c., as he had in 1855 when composing plaintiff's book, the result of which was contained in that book; or whether the knowledge and ideas, &c., from which Mr. Mongan

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The pleader, being probably of opinion that the foregoing statements constituted no sufficient answer to the action, further states in this defence, that "every part of defendant's books, except "the Latin text, were the result of fair and *bona fide* mental operations of Mr. Mongan upon said common sources of information, "and that no part thereof was copied or colorably altered from "plaintiff's book." This latter statement, that no part of defendant's book was *copied or colorably altered* from plaintiff's book, is no answer to the charge of defendant's books *containing printed therein various parts* of plaintiff's book: And in our opinion, the several other statements in the defence, taken together, do not afford any justification or excuse for the act so charged. Defendant's Counsel, in arguing this defence, have relied chiefly on the fact that Mr. Mongan was the author both of plaintiff's book and of defendant's books; and they have asked us whether we would lay down the proposition that, because the author of a book transferred the copyright in it, he was thereby precluded from again writing or publishing another book on the same subject? We do not intend to lay down any such rule; but in case of the author publishing another book on the same subject, then, though such other book may in some respects be similar to his former book, the question would be whether such other book should, under all the circumstances, be fairly considered as a new and original work, or merely as a reproduction, in whole or in part, of the former book? No such question is raised by the defence now before us. It has been also suggested that Mr. Mongan might, before composing defendant's books, have forgotten the knowledge and ideas, &c., which he had on the subject in 1855, and might have composed defendant's books in 1860 from knowledge and ideas acquired subsequently to 1855; in which case it is contended that defendant's books, though containing several parts of plaintiff's book, should be regarded as new and original works. Such a supposition is not a probable one; but it is enough for us to say that the present defence contains no statement, either expressly or by reasonable inference, to show that defendant's books are nev

and original works. And, in the absence of any such statement, it is not for us to speculate upon what passed through the author's mind, or whether the knowledge, ideas, &c., from which he composed defendant's books, were derived by memory from what he had in 1855, when composing plaintiff's book, or were derived from subsequent reading and study, independent of such previous knowledge and ideas. If defendant's books, though *containing printed therein* divers parts of plaintiff's book, are, on the grounds suggested or on any other ground, to be fairly considered as new and original works, that case will be open to defendant at the trial, upon the issue joined on the *second* defence; but with respect to the third defence, we are clearly of opinion that it is bad, and that the demurrer to it should be allowed.

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HAYES, J.

Two main questions have been made, in the argument of this demurrer, to the defendant's defence—first, that the plaint is bad, on general demurrer; secondly, that the third defence is also bad. The defendant insists on the first, and the plaintiff on the second. My opinion is in favor of the plaintiff on both questions.

In each of the four counts of the plaint, the plaintiff has averred a copyright in his book, under the statute 5 & 6 *Vic.*, c. 45, and an invasion of it, in various forms. In each count also it is alleged that, by reason of the premises, the plaintiff has been prevented from selling his book, and his profits in his copyright have been diminished.

After the repeated *dicta* and decisions upon the matter, it would be vain to contend that copyright in published books is anything but the creature of statute, or that it ever had existence at the Common Law. The 5 & 6 *Vic.*, c. 45, s. 2, defines "copyright" to mean "the sole and exclusive liberty of printing, or otherwise multiplying, copies of any subject to which the said word is herein applied." Those subjects are, by reference to the 3rd and 20th sections, ascertained to be "books," "dramatic pieces," and "musical compositions." And the term "book," it is enacted, shall be construed to mean and include every "volume, part or

M. T. 1861. "division of a volume, pamphlet, sheet of letter-press, sheet of  
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It has been argued for the defendant that, in the construction of this clause, the words "separately published" override all the antecedent words, including "part or division of a volume;" so that the word "part" must be construed in its technical sense, and as understood among booksellers; and familiarly known and exhibited to every lawyer in the mode of publishing the *Reports*, in *parts* or portions of a volume. In that construction I am disposed to agree; but I do not think that we are therefore necessarily, or at all, led to a decision in the defendant's favor on the general question.

All the counts of the plaint would seem to have been framed on the 15th section of the Act, under the impression that the plaintiff's remedy, as well as his right, was altogether the creature of statute; but that is not so. And, as I have already hinted, in the course of the argument, if the 15th section were completely struck out of the Act, the plaintiff would not be without a remedy: for it is a well-established principle of law that, when a statute has conferred a right, the Common Law at once steps in, and gives a remedy to the party for an invasion of such statutory right. On this part of the case I need not do more than cite the case of *Beckford v. Hood (a)*, and that is even a stronger case than the present. It arose under 8 *Anne*, c. 19, which gave a right of action for penalties to a common informer, by the very same section which conferred the right; while, in the present case, the statutory right and statutory remedy, such as it is, are given by distinct sections. Now what is the right, for the invasion of which a remedy is thus applied? It is "the sole and exclusive liberty of printing, or otherwise multiplying, copies of a book:" and I apprehend an author, or other person, cannot be said to be left in the exclusive enjoyment of this liberty if another person be permitted to print and multiply copies, to any extent, of any portion, even a page, of his book; for it is the owner of the copyright, and he alone, who, as a general principle, is to have the exclusive right of printing the whole or any portion of his book, and that right is invaded by an unauthorised

(a) 7 T. R. 620.

printing or publishing of any part of the work. It is for the protection and preservation of this right that the Common Law supplies a remedy.

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But that Common Law remedy is not to be taken advantage of without due regard also to the rights of the public, for whose benefit, in the encouragement of learning, the profits and advantages of copyright have been secured to authors. Accordingly it is well established, as an exception from the general rule to which I have adverted, that any person may, for the purposes of comment, criticism, illustration, or the like, print and publish, in his own book, a portion of a copyright work. And as these are only exceptions, which a series of decisions, as well in Law as in Equity, has engrafted on the general principle, it is sufficient in pleading for the plaintiff, when suing for an invasion of copyright, to aver his right, the invasion of it, and the damage he has sustained thereby. All this has, in my opinion, been sufficiently done in every count of the plaint; and I therefore think that it discloses substantially a good cause of action.

We come then to consider the third defence, which has been pleaded to all the counts of the plaint. It, in substance, avers that one James R. Mongan was the author, as well of the plaintiff's as of defendant's book; that the plaintiff's book was composed by Mongan in 1855, and the defendant's in 1860; that the defendant's book (which is a work of a different character from the plaintiff's) was composed partly from the knowledge and ideas that Mongan then had, and partly from common sources of information, which were, for that purpose, fairly and legitimately used by Mongan; and every part of the defendant's book, except the Latin text of the *Æneid*, was the result of fair and *bona fide* mental operations of Mongan, upon said common sources of information; and that no part of defendant's book was copied or colorably altered from the plaintiff's book.

The objection taken to this plea is, that it may be all literally true, and yet no defence to the action. Accordingly it has been suggested, as the possible state of facts, that, after Mongan had made his translation of the *Æneid* and sold it to the plaintiff, he

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was applied to by the defendant, and, on such application, furnished him, by way of notes to the *Æneid*, with a translation of numerous passages, which were either identical with the corresponding passages in the translation already sold to the plaintiff, or colorably altered from them. I concur in this view; being of opinion that, after Mongan had sold the translation to the plaintiff, and thus parted with the copyright, he, or any person deriving under him, had no right to publish the same translation, either in whole or in part, by way of annotation or otherwise, without some lawful excuse for so doing. And it is no excuse that the ideas to which Mongan gave expression in the defendant's book were the very same ideas, and clothed in the same language (subject only to colorable alterations) as he had previously expressed in the plaintiff's book, and been paid for by the plaintiff.

On these grounds, I think the plaintiff's demurrer ought to be allowed.

FITZGERALD, J.

I also concur in the conclusion at which the Court has arrived, upon both points. As I understood the arguments of the defendant's Counsel, the objection to the plaint was, that it stated no actionable infringement of the plaintiff's copyright, because the printing of *parts* of his book may be nothing more than a fair and legitimate use of that book; and, secondly, that the plaint was bad, as it stated only that *parts* of the plaintiff's book had been printed by the defendant, and that the printing of *parts* of a book in which copyright exists is not, *per se*, an actionable infringement of the copyright. It was argued, for the defendant, that the plaintiff should have alleged, though contrary to the fact, that the defendant had printed the *whole* of the plaintiff's book; and it was said that he might, at the trial, sustain that averment, by showing that the defendant had made an illegitimate use of *parts* of his book. As has already been said by both my Brethren, it is now settled that copyright has been created, defined, and limited by statute. Accordingly a great part of the argument turned upon the statute 5 & 6 Vic., c. 45; and we were referred to a great number of

cases for the true interpretation of that statute. I do not think that it will be necessary for me to go through those cases. They appeared to me, during the argument, to be very much beside the question which we had to consider. The Copyright Act (5 & 6 Vic., c. 45) is not the first statute dealing with copyright, but it is one of a series of Acts passed to regulate the law upon that subject; and in the preamble I find this passage:—"Whereas it is expedient to amend the law relating to copyright, and to afford greater encouragement to the production of literary works of lasting benefit to the world." I refer to these words, because light will be thrown by them upon previous decisions. Then follows the interpretation section, by which copyright is defined to be "the sole and exclusive liberty of printing, or otherwise multiplying, copies of any subject;" and I would add "of every part of any subject," "to which the said word is herein applied." When that subject is registered, the Act gives the proprietor of the copyright the further right of bringing an action for any infringement of it. The sections to which I shall refer are the 2nd, the 11th (which points out how the work is to be registered), the 15th (which gives the proprietor of copyright a remedy for the piracy of his property), the 24th (which is not an unimportant section, because it disables the proprietor of copyright from suing, or proceeding in any way, for *any* infringement, until after he has entered his book in the Book of Registry), and the 25th (which makes copyright personal property, and transmissible by bequest). The result of all these sections is, that the original publisher of a work, or any person deriving title from him, may have in that work, or in the subject of it, that special property which is called copyright; which, upon a fair interpretation of the statute, means the sole and exclusive right to print, not only the whole of that subject, but the whole and every part of it. That being the position of the plaintiff here, who shows himself to be the proprietor of copyright in a certain work, and who therefore has *prima facie* the exclusive right to print the whole and every part of it; he complains that the defendant,

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without and against his consent, printed parts of his work, so as to injure his property therein, by affecting the sale of the work; and the question is, whether the plaintiff has thereby stated a *prima facie* injury, which requires an answer? And the opinion which I have arrived at is, that the plaintiff has stated a *prima facie* cause of action, which required an answer. In determining that, we do not prejudge any of those important questions which will arise at some stage of this case. It is still open for the defendant to state—"Though I did the acts of which "you complain, I did them for the purpose of fair quotation "and criticism;" or to state that he did them for any of the other fair and legitimate purposes which the law allows. That the plaint is correctly framed is shown, to some extent, by the case of *Sweet v. Benning* (a), where Crowder, J., in his judgment, seems to touch the very point. He says:—"Looking "however at the language of the statute, I feel very reluctantly "bound to express my opinion that it may, and does amount "to piracy. It falls exactly within the 15th section, taken in "connection with the interpretation clause, s. 2. The result of "those two sections is this, that a person is guilty of piracy "who prints, or causes to be printed for sale, any book, or "part of a book, in which there is subsisting copyright, without the consent, in writing, of the author or proprietor." That interpretation of the Act is one which I am inclined to adopt: and we cannot fail to recollect that that judgment was pronounced in a case in which the declaration was framed exactly as the plaint is here.

But the plaint is further shown to be correct by the case of *Cary v. Longman* (b), where the second count of the declaration was substantially the same as the plaint in the present case, that is to say, it is alleged that the defendant was guilty of publishing portions of the plaintiff's book—"great part of which said book" are the precise words used. And I find that that case of *Cary v. Longman* is obviously the case referred to in the case before Lord

(a) 16 C. B. 457.

(b) 1 East, 353.

Eldon [*Mawman v. Tegg* (a)], for, in his judgment in that case, he said:—"The quantity ought to be ascertained, in order to authorise the Court to say that no part of the piratical work should go on; and on the other hand, nothing is more difficult than to grant an injunction against part of a work, *although an action may be brought for pirating a part.*" Again he says, a little farther on in his judgment:—"There is a case of an action tried before Lord Kenyon, in which a motion was afterwards made for a new trial; and there Lord Kenyon states that the question, whether you could grant an injunction against the whole of a book, on account of the piratical quality of a part, came before Lord Bathurst; and Lord Bathurst seems to have held, that you could not to do so unless the part pirated was such, that granting an injunction against that part necessarily destroyed the whole. Lord Kenyon, who possessed great information on this subject, states himself to have been perfectly satisfied with the opinion of Lord Bathurst, as bearing upon the judgment of Lord Hardwicke, and the other cases. In the case before Lord Kenyon, the declaration at law contained a count for publishing the whole work, and another for publishing a part; and Lord Kenyon's direction to the jury seems to have been to find damages for publishing the part only".

So far then as matter of pleading goes, the plaint here seems to be properly framed. And I adopt the view, taken by my Brother HAYES in his judgment, that, where a statutable right of property exists, the Common Law supervenes and gives a Common Law remedy for each infringement of that right. If the plaintiff has properly stated a *prima facie* cause of action, by stating that *parts* of his book were, according to the real facts, copied, that is a count which, though framed on the Common Law remedy, requires an answer. I am even prepared to go further, if it was necessary to do so, and to say that, even if we are, adopting to its full extent the interpretation of the statute given by Crowder, J., to consider this as a declaration, not framed on the Common Law, but on the statute, still the plaintiff has stated a good cause of action, according to the true and liberal interpretation of the statute.

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(a) 2 Russ. 398.



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I have now to say a word as to the demurrer to the third defence. The second defence has been stated by my Brother O'BRIEN; and one feels greatly relieved from responsibility on finding that the record contains such a defence, when we reflect that—what no one who has looked at the case can avoid seeing—this case involves most difficult questions, as difficult questions as any copyright case has yet presented. But every question of that kind is open to the defendant, upon the merits, under the second defence. During the argument, I asked whether the third defence was a traverse, or a plea in confession and avoidance? and Serjeant *Sullivan* said that it was a defence by way of confession and avoidance. I myself should rather have thought it a special traverse, so ingeniously framed that no fair issue could ever be taken upon it. But, since Counsel elected to deal with it as a plea in confession and avoidance, I will deal with it as such. My first proposition then is that, it being a plea in confession and avoidance, we must take it as admitting the truth of the statement in the plaint, namely, that the defendant did print parts of the plaintiff's book. Then, upon looking at the defence itself, one of the first questions that we have to consider is as to the concluding averment—"That no part of defendant's said books or "of either of them was copied or colorably altered from the said "book of the plaintiff." It was said that that averment constituted the substance of the whole defence; and, putting that averment by itself, is it an answer to the action? A plea framed in these words—that no part of the defendant's book was copied or colorably altered from the book of the plaintiff—would not be by itself an answer to the action; for it would admit the reprinting of parts, which is in substance a reprinting of the plaintiff's book; and the reprinting of the plaintiff's book, as to parts of it, is a cause of action, though those parts be not colorably altered, and that is the injury complained of. The remainder of the defence really amounts to this, that Mr. Mongan composed all three of the works, and that he composed them all from his knowledge, learning and ideas. Now put that defence in any way you will; reproduce it in any form you please; re-arrange it sentence by sentence; still it will merely amount to this—that Mr. Mongan composed all these works, and that he used

in their composition his knowledge, learning and ideas. Why that defence admits on its face that the defendant printed portions of the plaintiff's book; but that these parts were reproduced by him from the sources which formerly enabled him to produce the plaintiff's book. Now adopting the view put forward by my Brother HAYES, and assuming all this to be true, that defence affords no answer to the action; but contains an admission of what is, *prima facie*, a cause of action.

I therefore agree with my Brethren, that no issue could be taken upon this defence; and that none of the grave and terrible consequences with which we were threatened will happen by reason of our decision that the demurrer should be allowed.

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## THELWALL v. YELVERTON.

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May 1, 2, 3, 5.

In an action for necessities provided by the plaintiff for the defendant's wife, the substantial question was as to the fact of a marriage having taken place between the defendant and his alleged wife. The plaintiff gave evidence for the purpose of showing that, according to the law of Scotland, a valid, though irregular marriage had been celebrated. Professional witnesses called at either side gave conflicting evidence respecting the state of the marriage law of Scotland as bearing upon the facts of the case.

*Held*, that the Judge was right in leaving it entirely to the jury, as a question of fact, to say whether the alleged Scotch marriage was a valid contract in accordance with the law of that country, and that he was not bound to have directed them as to what was the state of the law of Scotland with reference to the facts in evidence.

Evidence was further given of a marriage having been subsequently celebrated in Ireland between the parties, by a Roman Catholic priest in holy orders, according to the rites of that Church. It was proved on the part of the plaintiff that the defendant had, within twelve months, occasionally attended Roman Catholic worship, that he had expressed himself in private conversations in approval of the doctrines of the Church of Rome, and that he had declared himself to be of that persuasion to the officiating clergyman. It was on the other hand proved, on the part of the defendant, that he had been born and educated in the doctrines of the Church of England; that he had never publicly renounced that profession, and that he had attended the Episcopal Service frequently during the twelve months next before the ceremony.

*Held, per* MONAHAN, C. J., and BALL, J., that there was evidence from which a jury might infer that the defendant had been a Roman Catholic throughout the entire period of twelve months before the marriage, so as to take the case out of the operation of the 19 G. 2, c. 13 (*Ir.*); the latter statute having reference to actual religious belief, and not merely nominal profession.

*Held contra, per* KEOGH and CHRISTIAN, JJ., that notwithstanding the evidence relied on by the plaintiff, the learned Judge was bound to tell the jury that the defendant had not ceased during the period in question to profess the Protestant religion within the meaning of the statute,\* and that the marriage was void in law.

*Quare*, as to the practice of inserting in the bill of exceptions the findings of the jury upon collateral questions left to them by the Judge.

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\* 19 G. 2, c. 13, s. 1 (*Ir.*), enacts that.—“Every marriage that shall be celebrated after the 1st day of May 1746, between a Papist and any person who hath been or hath professed him or herself to be a Protestant at any time within twelve months before such celebration of marriage, or between two Protestants, if celebrated by a Popish priest, shall be and is hereby declared absolutely null and void to all intents and purposes, without any process, judgment or sentence of law whatever.”

was, whether the party for whom the plaintiff had provided the necessities was the defendant's wife? The plaintiff relied upon the fact of the performance of two ceremonies of marriage between the defendant and Maria Theresa Longworth, one of which took place in Scotland, and which the plaintiff contended to be binding by the law of Scotland; the other performed in Ireland, by a Roman Catholic clergyman. The defendant insisted that no such contract was entered into as by the law of Scotland would suffice to constitute a legal marriage; and, secondly, that as regarded the Irish marriage, even though such might have been valid by the Common Law of the country prior to the passing of the 19 G. 2, c. 13 (*Ir.*), that it was invalid, on the ground that Major Yelverton at the time of the marriage, or rather twelve months next before same, was or had professed himself to be a Protestant. A great mass of evidence was given at the trial, the material portion of which is referred to in the judgments of the learned Judges. The LORD CHIEF JUSTICE having, in his charge, recapitulated the evidence relating to the two alleged marriages, and stated the law bearing on same, left to the jury the following questions: first, was such a contract entered into in Scotland? secondly, was it a binding marriage according to the Scotch law? And he informed the jury that if they should find in favor of the alleged Scotch marriage, they need not consider the validity of the Irish one; but in case they should find against the Scotch marriage, they should then consider as to whether a valid Irish marriage had been celebrated between the parties; which depended altogether on the matters he had already explained to them: and if they should find in favor of either marriage, they should find for the plaintiff on the issues joined on the record.

Counsel for defendant took the following exceptions:—

First—That upon the contradictory evidence given at the trial, the Judge should have determined the Scotch law himself, and should have told the jury that, under the circumstances of the ceremony, no person having been present, and it not having been evidenced by any writing, or performed with the intention of fully and completely perfecting the relation of husband wife, such a ceremony did not constitute a valid marriage.

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Secondly—That the Judge should have told the jury that, as it appeared by the evidence of Theresa Yelverton herself, that at the time of and after the alleged mutual acknowledgement said Theresa Yelverton considered herself his wife, by the *law* of Scotland, but not in *fact*, as she had scruples of a religious nature, he insisting on the rights of a husband, which she would not allow until a further ceremony by a Roman Catholic clergyman, such alleged mutual acknowledgement did not constitute a valid marriage.

Thirdly—Because the defendant required the Judge to tell the jury that, to constitute a ceremony of marriage, celebrated in Ireland by a Roman Catholic priest, it was necessary that both parties, for twelve months previous to such ceremony, should have uniformly, uninterruptedly, and publicly professed the Roman Catholic religion; and as there was no evidence of such profession by the defendant, the ceremony alleged to be performed by the Rev. Mr. Mooney between the parties did not constitute a marriage: which he refused to do, and left the case to the jury.

Fourthly—Because the defendant required the Judge to tell the jury that, if they believed that, within twelve months previous to the ceremony performed by the Rev. Mr. Mooney, the defendant attended Divine worship in the Protestant Episcopal Church of Scotland, and in the Established Church of England and Ireland, in Ireland, and that he did so as a professing Protestant, then such ceremony did not constitute a valid marriage: which he refused to do, and left the case to the jury.

Fifthly—Because the Judge told the jury that the profession of Protestantism was the doing of any unequivocal religious act inconsistent with being a Roman Catholic; whereas he should have told them that, if the party whose religion was inquired into had held himself out, by word or act, to others as a Protestant, within twelve months before the celebration of the matrimonial ceremony by a Roman Catholic, such party was a professing Protestant, within the meaning of 19 G. 2, c. 13 (*Ir.*).

The jury having found in the affirmative of the questions put to

them by the LORD CHIEF JUSTICE, a verdict was entered for the plaintiff upon all the issues. E. T. 1862.  
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*Jellett* and *J. T. Ball* were heard in support of the exceptions.

*J. F. Townsend* and *Whiteside*, contra, in support of the verdict.

The following cases and authorities were cited, on the question of the validity of the alleged Scotch marriage:—*Dalrymple v. Dalrymple* (a); *Beamish v. Beamish* (b); *Earl Nelson v. Lord Bridport* (c); *Bruce v. Burke* (d); *Sussex Peerage case* (e); *McCormick v. Garnett* (f); *Hogan v. Craigie* (g); *Honeyman v. Campbell* (h); *Bell v. Graham* (i); *Butler v. Earl of Mountgarrett* (k); *Bain v. Whitehaven and Furness Junction Railway Company* (l); *Adams v. Walker* (m); *Piers v. Piers* (n); *Co. Lit.*, p. 227, a; *Dowdale's case* (o); 8 *Bac. Abr.*, p. 117; 21 *Vin. Abr.*, p. 436–7; *Bridges v. Saer* (p).

With respect to the question of the validity of the Irish marriage, they cited:—*Kirwan v. Kirwan* (q); *Steadman v. Powell* (r); *Rez v. Hanly* (s); *Re Orgill* (t); *Regina v. Burke* (u); *Swift v. Kelly* (v); *Field's Marriage-annulling Bill* (w); *Meade's case* (x); *O'Connor v. McCann* (y); *Gibbons v. Gibbons* (z); *D'Arcys infants* (aa); 9 *W.* 3, c. 3 (*Ir.*); 2 *Anne*, c. 6, s. 31 (*Ir.*); 6 *Anne*,

(a) 2 Hagg. Consist. Cas. 81; *App.* 139.

(b) 6 *Ir. Com. Law Rep.* 213; 8 *C.*, 11 *Ir. Com. Law Rep.* 530.

(c) 8 *Beav.* 527.

(d) 2 *Addams*, 471.

(e) 11 *CL & Fin.* 85.

(f) 5 *De G., M'N. & G.* 278.

(g) *M'Cl. & Rob.* 965.

(h) 2 *Dow. & Cl.* 265.

(i) 13 *Moo. P. C. Cas.* 242.

(k) 7 *H. of L. Cas.* 647.

(l) 2 *H. of L. Cas.* 1.

(m) 1 *Dow.* 148.

(n) 2 *H. of L. Cas.* 371.

(o) 6 *Rep.* 350.

(p) 4 *Mod.* 89.

(q) *Batt. R.* 712.

(r) 2 *Addams*, 58.

(s) Cited in *Supp. to Carrington's Crim. Law*, 254.

(t) 9 *C. & P.* 80.

(u) 5 *Ir. Law Rep.* 549.

(v) 3 *Knapp P. C. Cas.* 257.

(w) 2 *H. of L. Cas.* 48.

(x) *Howard's Popery Cas.* 154.

(y) *Milward*, 204.

(z) 7 *Ir. Jur., N. S.*, 63.

(aa) 11 *Ir. Com. Law Rep.* 298.

T. T. 1862. c. 16, s. 6 (*Ir.*); 8 *Anne*, c. 3, s. 20 (*Ir.*); 12 G. 1, c. 3 (*Ir.*);  
*Common Pleas* 19 G. 2, c. 13 (*Ir.*); 23 G. 2, c. 10, s. 3 (*Ir.*).

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With respect to the form of the bill of exceptions, they cited:—

YELVERTON. *Sir Rowland Heyward's case* (a); *Re Ward* (b); *Palmer v. Gooden* (c); *White v. Sharp* (d); *Duke v. Forbes* (e); *Ball v. Mannin* (f); *Scanlan v. Sceales* (g); *Power v. St. George* (h); *Rutter v. Chapman* (i); *Trimleston v. Kemmis* (k); *Avery v. Bowden* (l); *Nepean v. Doe* (m); *M'Mahon v. Lennard* (n); *Wheelton v. Hardisty* (o); *Househill Coal and Iron Company v. Neilson* (p); *Davies v. Lowndes* (q).

*Cur. ad vult.*

CHRISTIAN, J.

June 30.

This case of *Thelwall v. Yelverton* is now before the Court for judgment upon exceptions taken, by the defendant, to the charge of the LORD CHIEF JUSTICE delivered at the trial, which took place in March 1861.

The issues, which went for trial upon that occasion, raised simply the question, whether certain necessities were supplied by the plaintiff for the wife of the defendant? It was not denied by the defendant that the plaintiff had in fact supplied those necessities to a lady whom the plaintiff called Mrs. Yelverton, and the defendant, Miss Longworth; and consequently the sole point in controversy was, whether that lady was the lawful wife of the defendant?

The plaintiff, as might have been expected, knowing the defence he would have to encounter, did not rest his case upon evidence of the kind which in ordinary civil actions is sufficient to raise a presumption of marriage, viz., cohabitation and general repute. Evidence

(a) 3 Dyer, 372, a.  
 (c) 8 M. & W. 890.  
 (e) 1 Exch. 356.  
 (g) 5 Ir. Law Rep. 158.  
 (i) 8 M. & W. 62.  
 (l) 6 El. & Bl. 973-4.  
 (n) 6 H. of L. Cas. 993.  
 (p) 9 Cl. & Fin. 788.

(b) 6 N. & Man. 38.  
 (d) 12 M. & W. 712.  
 (f) 1 D. & Cl. 880.  
 (h) 4 Ir. Law Rep. 110.  
 (k) 9 Cl. & Fin. 749.  
 (m) 2 M. & W. 894.  
 (o) 8 El. & Bl. 232.  
 (q) 1 Sco. N. R. 328.

of that kind, ranging over a period of some months, he did give. But that evidence was merely in corroboration of the positive proof which he undertook to produce of the ceremony itself. Two distinct solemnizations were deposed to, by the one or the other of which the plaintiff insisted that the relation of husband and wife was legally constituted; one in April 1857, in Scotland, the other in August 1857, in Ireland. On these he rested his case. Both these points were presented by the learned Judge in his charge to the jury, and with appropriate comments upon each. Exceptions were taken, by the defendant, to the charge, in both particulars. The verdict was for the plaintiff.

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The exceptions are five in number. The two first relate to the Scotch marriage, the remaining three to the Irish marriage. Of course, if all the exceptions of both classes should be overruled, the plaintiff will retain his verdict; whilst if all, or some of each class, were allowed, there should be a *venire de novo*. But in the possible event of all the exceptions of the one class being overruled, while all or one or more of the other class are allowed, a question of novelty and importance, as regards procedure, will arise, as to what should then, having regard to the form of this record, be the fate of the case.

In dealing with the questions of law which are now to be determined, it is not my intention to enter further than is absolutely indispensable into the facts of this extraordinary case. They are already more than sufficiently notorious, they are of course familiar to the parties and their Counsel. Upon that assumption I proceed at once to the consideration of the questions which are raised by the exceptions.

The two first exceptions complain of the charge in relation to the alleged marriage in Scotland. That question was, in both its ingredients, purely one of fact. Whether any such ceremony ever took place at all? and if so, whether it was such as to constitute a marriage valid according to the law of Scotland? Each of these alike could only be treated at the trial, and can only be treated here, as a question of fact, which it was the province of the jury exclusively to determine. There was evidence upon each, on which they might



T. T. 1862. have found either way ; that evidence could not possibly have been  
*Common Pleas* withdrawn from them, and it was left to them in a manner of which  
 THELWALL it is, in my opinion, impossible justly to complain. If it were com-  
 v. petent for us to enter as lawyers into this question of Scotch law,  
 YELVERTON. or if the case were before us on a motion for a new trial, upon the  
 ground of the verdict being against evidence, or the weight of  
 evidence, or in any shape which would entitle us to form, and to act  
 upon, an opinion of our own as regards the alleged ceremony or  
 contract in Edinburgh,—judged of by the light of the subsequent  
 correspondence, all I shall say is, that we should then have a very  
 different question to deal with. But the case is before us on two  
 specific exceptions, each of which calls for a direction on what it is  
 utterly impossible *for us* to treat as anything but a question of fact.  
 It is not for us to say, whether or not, in the event of this case being  
 brought to the House of Lords, it may be considered there that the  
 function of that House, as a Court of Scotch law, can, in this Irish  
 case, be brought to bear upon this question ; but *we* possess no such  
 function. Neither party asked for an application to the case of the  
 remedy afforded by the statute 22 & 23 *Vic.*, c. 63 ; and whatever  
 be the value of the opinion of the Irish jury upon this point of  
 Scotch matrimonial law, upon which the learned Advocates who  
 were examined before them were directly in conflict, and without  
 giving any opinion of my own as to the validity or invalidity of the  
 alleged Scotch ceremony, which I disclaim all notion of doing, I am  
 clearly of opinion that, so far as these two first exceptions are con-  
 cerned, *we* can do nothing but overrule them both.

The third, fourth and fifth exceptions relate to a part of the case  
 which presents questions of much greater difficulty, as well as of  
 more interest and importance to us in this country. They embody  
 the question of the validity in law of the Irish ceremony. There  
 is here no controversy at all as to the *fact* of the ceremony. It is  
 admitted that, on the 15th of August 1857, in Killowen chapel, a  
 ceremony was performed by a Roman Catholic priest, which, if both  
 those persons had been then, and for the twelve months next prece-  
 ding, of that persuasion, would have bound them to each other as  
 man and wife. The ceremony being thus established, the conse-

quence is this, that the burden of proof is shifted to the defendant. *Semper presumitur pro matrimonio*, and everything which is necessary to the validity of the marriage will be presumed, until proof to the contrary is adduced. It rests then on the defendant to invalidate the marriage, thus *prima facie* good; and this he assumes to do by the aid of the statute of which we have heard so much, the 19 G. 2, c. 13 (*Ir.*).

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In considering this part of the case, the course I shall take will be this:—I shall first state my own opinion of the position in which the case stood, in law and in proof, at the close of the evidence on both sides, and before the charge was delivered. In doing so, it will of course be necessary for me to explain my construction of the Act of Parliament, and my appreciation of the evidence. Having done that, I shall then be in a position to proceed to an examination of the charge and of the exceptions, with a view to the inquiry whether there is any error in the charge? and, if there be, whether it is met by the exceptions, in the form in which they were taken?

First then, as to the construction of the statute,—I will not go through the form of reading it; we ought all, by this time, to have it nearly by heart. It was the last of a series of statutes, which were fully commented upon during the argument, beginning with the 7 W. 3, c. 3; and which constituted one branch of the great Penal Code; the object of which was, as we all know, to exclude from property and power the adherents of a creed the tenets of which were believed to be associated with certain political purposes which were under the ban of the State. The main body of the code struck directly at its object, by the withdrawal of property from the hands of Roman Catholics. The branch we have here to deal with came in aid of the former, by aiming at the removal of Roman Catholic influence from Protestant proprietors, by preventing mixed marriages, or any marriages in which Roman Catholic priests should have a part. The statutes, as they succeeded each other, increased in stringency; but they worked mainly by the imposition of forfeitures and penalties upon the parties, and punishments upon the priest; but not by avoidance of the marriage, until we come to the one we have to do with, the 19 G. 2. That statute,

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as we know, rendered absolutely null and void, to all intents and purposes, without process of law, all marriages celebrated by a Popish priest, if both or either of the parties had *been, or had professed* him or herself to be a Protestant, *at any time* within twelve months before the marriage. It is a remarkable circumstance, and one, I think, creditable to the morals of the country, that, although this statute has been in force for considerably more than a century, so few cases appear to have arisen in which advantage was taken of its provisions: so, at least, I infer from the paucity of authority in the books. Two cases only, of much value as guides upon the construction of the statute, were referred to, viz., *Kirwan v. Kirwan* (a), and *O'Connor v. M'Cann* (b). In the first of these cases, which, in the way that it is reported, is more valuable for the argument of Counsel than for the judgment of the Court, it was strongly contended, by Mr. *North* and Mr. *Crampton*, that the phrases in the statute "hath *been* a Protestant" and "hath *professed* himself to be a Protestant" are simply synonymous; and that the Act contemplated Protestants and Roman Catholics alone, and not any intermediate class, such as persons who *professed* to be the one or the other. Here the Court of Queen's Bench first, and afterwards the Court of Error, dealt with that argument; and how they construed the statute in that respect, we have better given to us by the late Dr. Radcliffe, in *O'Connor v. M'Cann*, than in the report in *Batty*; and to that construction Dr. Radcliffe adds his own high authority, in a passage which contains, in my opinion, the most authoritative exposition upon this statute extant; uniting, as it will be observed it does, the authority of the Courts of Queen's Bench, Exchequer Chamber, and Prerogative; which I am now prepared to follow and adopt, and which, in my humble opinion, is warranted by the language of the statute, and strengthened by what is found in other statutes, some before and some after it, upon the same or analogous subjects. The passage is this:—"In the case of *Lessee of Kirwan v. Kirwan*, it was "strongly argued that the words in that Act 'every person who "hath been,' or 'hath professed himself or herself to be,' a

(a) *Batty*, 712.(b) *Milward*, 204.

"Protestant, are synonymous; but the Court, and afterwards the  
 "Court of Error, were agreed that the Legislature contemplated  
 "not only one, but two descriptions of persons—first, legal Pro-  
 "testants; secondly, professing Protestants, in contradistinction to  
 "legal; and avoided the marriage of a person of either description  
 "with a Roman Catholic, if celebrated by a Roman Catholic  
 "priest—*i. e.*, the marriage, with a Roman Catholic, of one bred a  
 "Protestant and born of Protestant parents, or who had legally  
 "conformed from the Roman Catholic religion to the Protestant,  
 "and filed a certificate of conformity; and the marriage of one  
 "bred a Roman Catholic, and born of Roman Catholic parents,  
 "who professed Protestantism within the twelve months, though  
 "he or she did not legally conform, and file a certificate of con-  
 "formity."

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Now, a careful examination of that important passage will show  
 the meaning to be this. The statute, in the first instance, contem-  
 plates the existence of two great classes, namely (in Dr. Radcliffe's  
 expressive language), legal Protestants and legal Roman Catholics.  
 Legal Protestants are those whose birth, family, breeding, public  
 religious observances, are Protestant; and also those who, having  
 been originally in those respects Catholic, have given the statutable  
 proofs of conformity to the Protestant religion. All these persons  
*the law* classes and stamps as Protestants. On the other hand,  
 legal Catholics are those whose birth, breeding, and observances  
 denote them as such, and who have *not* given the statutable proofs  
 of conformity. But the law, in furtherance of the policy of this  
 statute, recognises a class intermediate between these two—*i. e.*,  
 legal Catholics, who have *professed* to be Protestants, though they  
 have not legally conformed, and are therefore still legal Catholics.  
 This intermediate class is again distinctly indicated at p. 211 of the  
 report, where Dr. Radcliffe says—"She must be still deemed a  
 "legal Roman Catholic and non-conformist; and the question is,  
 "though she did not conform and become a legal Protestant, whe-  
 "ther she professed herself to be a Protestant at any time within  
 "twelve months before the marriage was had." A consequence of  
 this construction might well have been, when the whole Penal Code

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From the construction thus placed by authority upon the statute, there are two results which are of great importance to the present case. The first is this, that while the Act contemplates this intermediate class of actual *Catholics*, who though being such are treated as Protestants, because they *professed* to be so, there is no correspondent class of actual *Protestants*. There is not a word in the statute about a *Protestant* professing to be a *Catholic*. The inference is inevitable that, once a man is placed in the category of a legal Protestant, nothing can take him out of it, in the view of this statute, but an absolute and total putting off of his Protestantism, and in classing himself out and out a legal Catholic. What may be the appropriate method and proof of this transmu-

tation is a question more easily asked than answered, and of which I shall have more to say by and by: it has never yet been successfully maintained in any case that we know of, unless it be by the verdict in the present action.

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The other point to which I have just adverted is this:—When the statute speaks of one who “hath been a Protestant,” *i. e.*, of a legal Protestant, it means one whom outward action and visible antecedents have exhibited as such. That is conveyed by the very term itself—“*legal*.” *The law* does not pretend to dive into hearts and consciences in search of opinions upon abstract doctrines, in order to class men according to what it shall find them. It is not a theological but a political law, and it takes men as they stand in external act and semblance before the state. Whether a man “hath been” Protestant or Catholic is to be judged by parentage, breeding, observances, and the like, not by inward faith or belief. The latter issue would be impracticable. What is the precise condition of abstract doctrinal belief which makes a Catholic or a Protestant? What are the essential points of difference? Must we call divines in each case to draw the exact line of demarcation? and must we then institute a scrutiny into the belief or disbelief of the individual in each of the essential doctrines? Human life does not afford either the time or the means for such investigations. Dr. Radcliffe, in *O'Connor v. M'Cann*, and Lord Brougham, in *Swift v. Kelly* (a), are to the contrary. The latter puts [p. 288] this strong example:—“A Catholic with us cannot be presented to “a living unless he abjures the errors of the Romish Church; a “proof that he abjured, and was all the while a Papist in his “heart, never would lead to a deprivation, while he conformed to “our canons and avoided all ecclesiastical offences; nor could any “question ever be suffered to arise whether his conformity was for “conscience sake and *pro salute animæ*, or for the lucre of gain “and to obtain Protestant preferment.” If that be the principle in such a case, how much more must it be so in a case like this. Whether is it more fitting that questions of marriage or concubinage, of legitimacy or bastardy, should depend upon occult opinion

(a) 3 Knapp P. C. Cas. 286.

T. T. 1862. or upon open conduct? This is the point, a want of due attention  
*Common Pleas* to which, at the trial, lies at the root of the error which has in my  
 THELWALL opinion occurred in this part of the case.  
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YELVERTON. The actual decision in *O'Connor v. McCann*, or in the other case which was cited of *Bruce v. Burke* (a), do not throw any light on the construction of the statute. They both turned entirely upon the question of the sufficiency of the evidence for proving that persons originally legal Catholics had professed to be Protestants; which the evidence in each case failed to show.

Such being, in my opinion, the construction of the statute, in adopting which I but follow the only authorities we have for our guidance, the next thing to be done is to consider the evidence, with a view to ascertain what the facts are to which in this case the statute thus construed is to be applied. A marriage celebrated by a Popish priest being null and void unless the *status* of both parties has been for the preceding twelve months continuously and without profession to the contrary that of legal Catholics, I have now to inquire how far that condition was fulfilled in the present case. As regards the lady it clearly was so. But what about the gentleman? Now if ever there was a man whose original *status*, at all events, was clearly shown to be that of a legal Protestant, it is Major Yelverton. The proof in that respect is presented with singular completeness. He is traced from, I may say, his cradle to the very month in which the ceremony took place. He was born the eldest son of a titled Protestant family. Both his parents were Protestants. As a matter of course he was reared a Protestant. Archdeacon Knox, rector of Lorrha, the parish in which Belleisle, the residence of the Avonmore family, is situate, takes him up, as a boy going regularly to Church with his parents before he went to school, and after, when at home for the vacations. Mr. De Burgh Dwyer is to the same effect. Major M'Kay, a schoolfellow, also a fellow cadet for two years at Woolwich Military Academy, tells us what he was during those periods of his life, a regular attendant at the Church of England Service. Captain Purvis takes him up after he had entered the army. He was with him in Malta, from 1851 to

(a) 2 Adams, 471.

1854. The native religion of Malta is the Roman Catholic. There were numerous Roman Catholic Churches at Valetta, to which the Roman Catholic officers and soldiers went. But the defendant attended worship at the Church of England Protestant Church, taking his turn to go with the men; and he was reputed to be a Protestant. Serjeant-major Moulds, Serjeant Brydone, and two other Artillery soldiers, as well as Major M'Kay, trace him from Alderney, in 1855, to Sheerness—thence on board the “Transit” transport to the Crimea; and in the Crimea, doing duty as a Protestant officer—attending worship with the men, and on one occasion, in the Chaplain's absence, reading the Church of England Service to the men. The regiment came home from the Crimea in June 1856. Defendant did not come with them. He rejoined in October 1856, at Leith Fort. During that interval there is a break in the evidence. But from October 1856 downwards, all within the twelve months, in October, December 1856, February, March, April 1857, we have the evidence of the Artillery soldiers as to his attendance with the troops at the Episcopalian Church at Leith. Then he is again taken up by Archdeacon Knox and Mr. De Burgh Dwyer. He was on a visit to his brother at Belleisle in the summer of 1857; and the two last witnesses prove his repeated attendances during April, May, June and July 1857—the very month of the Irish ceremony—on Sundays at Divine Service at Lorrha Church, though there is a Roman Catholic chapel in the neighbourhood. And Archdeacon Knox, the very best of witnesses, the rector of his family parish, who knew him from a boy, also Mr. Dwyer who knew him from a boy, both prove that he was always reputed to be a Protestant of the Church of England. Nothing therefore could be more complete than the proof of the original religious status of Major Yelverton—by birth, by breeding, by practice, a perfect specimen of that which Dr. Radcliffe so significantly calls a *legal* Protestant.

Well then, what is the consequence of that? Why that *prima facie* the marriage is void. Is there any way of supporting it? One, and one only, if my construction of the statute be correct, namely, by proving that at some date earlier than the 15th of

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T. T. 1862. August 1856, Major Yelverton had put off his Protestantism and transferred himself out and out from the class of legal Protestants to that of legal Catholics; and that from thenceforth, to the hour of the marriage on the 15th of August 1857, he continued without lapse or faltering in his new profession. Thus the burden of proof, which shifts more than once in the progress of this inquiry, is again shifted upon the plaintiff. By what means can he sustain it? What is the sort of proof which the law requires to show that a person, upon whom it has once set its stamp of Protestant, with whose marriage a popish Priest must not meddle, has had that stamp effaced, and stands before it one of the disfavored class? It is difficult to define it *a priori*, and in no case yet before the present has it ever been successfully asserted. Then profession, occasional or interrupted, will not do here. I have already pointed out that the statute contemplates no such thing as one who *is* a Protestant *professing* to be a Catholic, while it does expressly contemplate and fasten on the case of one who *is* a Catholic professing to be a Protestant. A Catholic loses his right to be married by a priest, by a single unequivocal professing of Protestantism within the twelve months, though he relapse to his original state, or even never really changed it. A Protestant cannot acquire the right to be so married except by a thorough and radical putting on of Catholicity, ever afterwards maintained without lapse or swerving. But how is this to be made outwardly manifest? It may be that nothing less would do than some solemn ceremony of recantation or of reception into the other Church, followed by continuous observance of its rites. The plaintiff in this case does not go so far as that, but he has given in the third exception a definition less than which, at all events he says, would not do. This third exception (to which a little in anticipation I shall now refer) embodies two propositions, one of law, the other of fact. I am now speaking of the first. It is this—"that  
 "to constitute, a ceremony of marriage celebrated in Ireland by a  
 "Roman Catholic priest a valid marriage, it was necessary that  
 "both parties for twelve months previously to such ceremony  
 "should have uniformly, uninterruptedly and publicly professed  
 "the Roman Catholic religion." I am of opinion that that propo-

sition is correct. If what I have ventured to lay down as to the construction of the statute be well founded, it follows necessarily that nothing less, at all events, than what is here stated will serve the turn. They must both have been Catholics for the whole of the twelve months—they must have been so “uniformly” and “without interruption,” because a single lapse to Protestantism, or to profession of Protestantism in either, is fatal—they must have been so “publicly,” because publicity is an essential element in all *legal* religionism. The law notes and classes a man as that which he is in public—as he stands before the law, the State and the people,—not as he is in his heart or in his closet, or in his private conversations with the woman he is trying to deceive, or the priest he is trying to make the tool of his purpose. The case was put, during the argument, of a man shut up for the whole twelve months in one room, and it was asked how could it be said of him that he publicly professed anything? The answer was given that the law will presume that he continued professing that which he was known to profess before he went into the room. In order to constitute a professing of anything, it is not necessary that the party should be always *doing acts* of profession. A Barrister by profession is professing to be such every hour of his life, as well when he is shut up in his study or recreating himself among the mountains of Switzerland, as when he is walking the hall of the Four-courts. This first proposition, propounded by the third exception, has, in my opinion, been successfully vindicated.

Then presents itself, in natural order, the question, the negative of which is asserted in the second branch of the third exception, *was* there any *such* evidence? The only difficulty here (if difficulty there be at all) is that, in the way the case is presented to us, the question is rather of form than of substance. If the question of substance were open to us, namely, was the verdict right upon this point, I suppose it would not be argued. It is one of the ugly features of this case (which I consider to be in many of its aspects one of the most mischievous that has ever come before the public) that it has exhibited an Irish jury (a special jury too, I presume) returning a verdict in open defiance of truth and even probability.

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T. T. 1862. With quite as much of truth and reason might they have affirmed  
*Common Pleas* Major Yelverton to have been a Mahometan, as what they have by  
 THELWALL this verdict affirmed him to have been. But the question on the  
 v. exceptions is, was there evidence which the plaintiff had a right to  
 YELVERTON. have left to them on this point? The exception which I have just  
 read is not the common one for want of evidence; for it commences  
 by defining, in the shape of a proposition of law, what the character  
 of the evidence ought to be, and then insists that there was none of  
 that character. If once we accept the legal proposition, I confess  
 it seems to me that the rest is free from difficulty.

The first thing material here be observed is this—not one act or  
 word of the defendant's is referred to of an earlier date than the  
 commencement of the twelve months. Every act, every expression  
 which deserves to be noticed at all, was done or spoken within the  
 twelve months. Again, the proof of them, such as they are, rests  
 exclusively on her own evidence, and they were all done or said in  
 connection with his designs upon herself. And what are they?  
 They consist of two kinds; first, going to places of Catholic wor-  
 ship; secondly, private conversations with her. As to the first, she  
 deposes to three instances; two in Edinburgh, in March or April  
 1857, and one at Warrenpoint in Ireland, in August 1857. These  
 constitute the entire case as to outward profession of Catholicism.  
 Now I will not stop to reason upon the purpose with which he went  
 to those chapels—whether it was to worship, or whether it was as  
 a dangler after this woman. Her own opinion on that is sufficiently  
 shown by the remarkable expression in her letter of the 10th of July  
 1857. But assume the former, they fail the plaintiff in this, they  
 have no relation backward. The utmost force which can be ascribed  
 to them is, that they are evidence that he was *then*, in March or  
 April, and August 1857, a Catholic. But *time* is an essential part  
 of the burden of proof which is here cast upon the plaintiff. It  
 would not do to prove, in the clearest manner, Yelverton's conver-  
 sion, unless he further proved that it took place some time before  
 the 16th August 1856. The original profession of legal Protest-  
 antism is, by presumption of law, carried onward and downward to  
 the very point at which it is for the first time met by proof of

conversion. Well, if my construction of the statute be the right one, I might stop there. If the legal test be the outward one, there is literally nothing to set against the overwhelming body of proof on the defendant's part, which I have just reviewed. But it will be more satisfactory to glance at the other head of evidence—the representations, the lady tells us, he made to herself. It will be found in our paper-books, at pp. 11 and 13, in the lady's direct examination; and at pp. 16, 17, 18, of her cross-examination, to which, for brevity's sake, I refer.

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Now, with respect to that evidence, the first observation which occurs is, that it fails in precisely the same point as the former; it has no relation back. It is all spoken within the twelve months, and all *in verbis de præsenti*; all, with the exception of one expression (at p. 18 of the book), "I don't believe in it now, *and never did*." These two words "never did," are literally the whole case. Without them, there is not a shred of evidence that the alleged conversion to Catholicity of this man, beyond all doubt originally a Protestant, took place twelve months before the marriage; without proof of which the plaintiff has no case. But it is said these words give point to all the rest; and enabled the jury to carry back, as far as they pleased, the state of Catholicity which there was evidence, it was said, was existing, at all events, when those statements were made. Well now is there any colour for that? Here is a man, born of a Protestant family, reared a Protestant, serving in the Queen's army as a Protestant officer, doing duty as such, holding himself out to the state and to the world as a Protestant, and proved to be doing so continuously down to the very month of the marriage. Well, he never believed in it. Take it so. Is he less a Protestant, in the eye of the law, for that? I do not think he is. He may, in his heart, think it all mere conventionality and form; he may be a Deist or an Atheist; but in the eye of the law, for all purposes of legal classification and *status*, such a man is as much a Protestant as the Archbishop of Canterbury. Therefore the one fragment of proof, which alone can be said to retrospect behind the commencement of the inevitable twelve months, goes to a point which, when applied to a man of Yelverton's present legal

T. T. 1862. *status*, is simply irrelevant. Well, the consequence is, that, even if  
*Common Pleas* the lady's evidence rested wholly unqualified and unimpaired, it  
 THELWALL would fall short essentially of what the plaintiff has to prove. But  
 v. it is far indeed from being unqualified or unimpaired, as we will  
 YELVERTON. find if we look at the evidence of the other two of the plaintiff's  
 witnesses who were examined on this point—Miss M'Farlane and  
 the Rev. B. Mooney. Miss M'Farlane says "that whenever the Ca-  
 "tholic religion was talked of in defendant's presence, he always  
 "appeared to lean towards Catholicity." That is to say, the man  
 who, the plaintiff undertakes to prove, had before 16th August  
 1856 absolutely renounced his Protestantism, in February or March  
 1857 seemed to be still only "leaning towards Catholicity." But  
 by far the most important witness upon this part of the case is the  
 Rev. Mr. Mooney, who gives us the defendant's solemn assertion of  
 his religion, at the supreme moment when he stood with the woman  
 at the Roman Catholic altar, for the purpose of the ceremony.  
 "Are you a Roman Catholic?" says Mr. Mooney. "*I am not.*"  
 "But what are you?" "*I am a Protestant Catholic.*" I ask,  
 how could the English language supply a more direct, straightfor-  
 ward denial of Catholicity, and assertion of Protestantism, than is  
 to be found in that short dialogue? It seemed to have been  
 forgotten, in the argument, that Protestants assert their right to  
 the designation "Catholic"—that is, belonging to the Universal  
 Church of Christ; and it is to show that they do so, that, when  
 they speak of members of the Church of Rome, they call them  
 Roman Catholic. Could the best Protestant man in Court give any  
 better definition of himself than that "I am not a Roman Catholic,  
 but I am a Protestant Catholic;" and this is the open avowal of the  
 man, when questioned by the priest at the altar, in presence of the  
 woman, with a view to the ceremony. And the priest perfectly  
 understood him. He knew he was solemnizing a marriage void in  
 law; and accordingly, in his evidence, he would not call it a mar-  
 riage at all, but "a renewal of marriage consent." And this is the  
 man who, it is said, not only abandoned his Protestantism twelve  
 months before, but never made a single profession of it within the  
 twelve months. That is the way the case would stand if you look

only at the plaintiff's own proof; but, to a right judgment on the whole case, you must take in the defendant's proof also. The question is, as is now so well settled, not whether there is, in support of the affirmative, a scintilla of evidence; but whether, on the whole evidence, there is a case which ought to be left to the jury. Place now, side by side with that evidence for the plaintiff, which I have been reviewing, the evidence of Archdeacon Knox and Mr. Dwyer, and the other witnesses, as to what Yelverton was openly doing down to the very month of the marriage; and I ask now, bearing in mind what the burden of proof was which was on the plaintiff, was there a case in which a rational verdict could be found in his favor? This was, in my opinion, the miscarriage of the case. The notion of Yelverton's conversion from Protestantism to Catholicity had, in my opinion, no foundation in reality, but was purely a fiction—I cannot say whether of his or of hers, upon which the jury ought not, in my opinion, to have been exposed to the risk of falling into the miscarriage into which unhappily they did fall.

Before I leave this part of the case, I have no hesitation in stating that, if it were necessary, I should be prepared to hold that, in cases like the present, evidence of representations privately made to the woman or the priest, in order to effect the purpose, do not constitute the sort of proof which the law requires. In the converse class of cases, where the point at issue was, whether one originally a legal Catholic had become converted<sup>(a)</sup> to, or had professed to be, a Protestant, and there was conflicting evidence on that, proof of his declarations of adherence to his original faith have been, along with other evidence, I think, properly admitted. But in the case of a legal Protestant, as to whom nothing will satisfy the law but a conversion, out and out, to Catholicity, and who is presumed to be going on still outwardly professing his Protestantism, I do not think that such representations are, I will not say admissible, but such that they alone would constitute a case on which the law would act at all. Once you hold, as the CHIEF JUSTICE laid down in his charge in the case, which was acquiesced in, and as this Court had previously held in *Re Darcy* (a), that such representa-

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(a) 11 Ir. Com. Law, 298.

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tions create no estoppel, you, in my opinion, go far to dispose of this question. The CHIEF JUSTICE, in that case, disapproved of *Reg. v. Orgill* (a), in which I entirely concur; and I go further, and do not hesitate to say that, if the other case, of *Rex v. Hanly*, before O'Grady, C. B., was no more than what is reported—i. e., an original Protestant representing himself to the priest as a Papist, in order to bring about the marriage, I doubt extremely whether, on that evidence, the case ought to have been left to the jury, and whether an acquittal ought not to have been directed. It was overlooked, in those cases, that there was a question of public policy involved. The Act of 19 G. 2 is a political Act. It belonged to a code, of which Robinson, J., says, in *Farrell v. Tomlinson* (b), It "ought not to be considered as penal, but as remedial and constitutional, made for the preservation and security of the Protestant interest and establishment in this kingdom." The object of this particular Act was to forbid Roman Catholic priests meddling with marriages of persons who were really Protestants, whatever they might falsely and fraudulently represent themselves to be, for the attainment of a purpose. One of the objects of requiring that the Catholicity should be continuous for the whole of the twelve months was to exclude temporary fraudulent simulation of Catholicity, got up for the purpose of the marriage.

I have now explained the view I take of the law and of the evidence, and the result will be seen to be this—first, that, by the defendant's proofs, the case was clearly brought within the operation of the statute 19 G. 2, c. 13; secondly, that the plaintiff wholly failed to make any case at all to repel that proof: and if I be right in that, and if such was, in law and in proof, the state of the case at its close, it must follow that the Judge was bound to tell the jury that, if they believed the defendant's witnesses, the Irish marriage was void in law, and that they should discharge it from their consideration.

I turn now to the charge and the exceptions.

The charge, as reported, is not, upon this branch of the case, so full as upon the former. And if I were at liberty to conjecture the

(a) 9 C. & P. 80.

(b) 5 Bro. Par. Ca. 442 (Tomlin's ed.).

reason, I should be disposed to suggest (I am not far from correction if I be wrong), it may have been that the learned CHIEF JUSTICE did not perhaps think that this was the serious part of the plaintiff's case; and possibly the verdict upon it was not exactly what he expected. After giving the jury an injunction, which I wish from my heart they had attended to, viz., that if they should be of opinion with the plaintiff on the Scotch marriage, they need not consider the alleged Irish marriage at all, he then points out to them that, on the contrary supposition, they must consider the Irish marriage, and that, as to that, the case depended upon the statute 19 G. 2; and that "the only question on this part of the case was, whether Major Yelverton was, at the time of the marriage, or within twelve months before, a Protestant, or had he professed himself to be a Protestant within twelve months before?" He then tells them that the law of estoppel does not apply to the case: "And he further informed them that, it appearing that Major Yelverton was born of Protestant parents, and had in his youth been brought up a Protestant, the presumption of law was, that he continued such; and therefore, to find in favor of the alleged Irish marriage, *they should, on the evidence, be satisfied that, twelve months before the 15th day of August 1857, he had ceased to be a Protestant, and become a Roman Catholic; and that he had not, within those twelve months, been, or professed himself to be, a Protestant; and though they should, on the evidence, be satisfied that the defendant Major Yelverton had, in reality and fact, been a Roman Catholic during twelve months preceding the 15th of August 1857, still that if, within that period, he professed himself to be a Protestant, the alleged Irish marriage would be null and void: and he directed their attention to the evidence in the case applying to this question, namely, of Major Yelverton himself, and the other witnesses, who had proved his attendance at Divine worship in the Episcopalian church at Leith and Edinburgh, in the early part of the year 1857; and the evidence of Archdeacon Knox and Mr. Dwyer, who deposed to his having attended Divine service in the church of Larrha, in the months of May and June 1857: and he further informed the jury that*

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T. T. 1862. "*a profession of Protestantism, within the Act, such as he was*  
*Common Pleas* "*calling their attention to, was the doing of any unequivocal*  
 THELWALL "*religious act, inconsistent with the party doing it being a Roman*  
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Now, if what I have stated to be my opinion as to the construction of the statute and the effect of the evidence be correct—if it be—for everything depends on that—it needs not much argument to prove that there is error in what I have just read. It leaves to the jury the question of Yelverton having ceased to be a Protestant, and having become a Roman Catholic; and, by the very act of doing so, as well as by the language used, conveys to them that there *is* evidence on which they may so find. It then goes on, upon the assumption that they will or may so find, to explain to them carefully what sort of proof it is which the law would require to bring him back again to his state of Protestantism. But if my view of the case be correct, there was no case at all to go to the jury on which they could rationally find that he had ever ceased to be a Protestant, still less that he had done so twelve months before the marriage. The passage I have referred to (to put it at the very lowest) displays *non*-direction, of a kind which amounts to *mis*-direction. When the CHIEF JUSTICE tells the jury that "they should, on the evidence, be satisfied," &c., that would be so far correct if there were any; but he should, in my opinion, have at least gone on to explain to them what this statute means by "being a Protestant," and what the sort and class of evidence are which the law requires to prove that one who has once been classed as a legal Protestant can cease to be so, and become a legal Catholic: and should furthermore have told them that there was not, in this case, any evidence of that class. The want of these additions gives to the passage in question the effect of misdirection: and what adds peculiar force to the objection is the circumstance, that after the assumption is made, that the jury *may* find him to have become a Catholic; and when the charge goes on to apply itself to point out what sort of evidence would bring him back to the condition of a Protestant, very careful and minute directions are given; and it is in connection with this that the important evidence of

Archdeacon Knox and Mr. Dwyer, and the other witnesses, is referred to; whereas the true force and bearing of that evidence was on the former question, the only real question, had he ever forsaken his state of Protestantism at all? For my own part, I confess, I can only account for the verdict on the supposition that the jury were misled by this peculiarity in the charge; and fell into the mistake of supposing that the point which was dwelt on and elaborated was the true question, and took for granted the other, which was so lightly passed over.

In *M'Mahon v. Lennard* (a), Mr. Justice Wightman observes—  
 “The omission to direct the jury upon a material point, upon which the Judge is required by the Counsel to give a direction, may amount to a misdirection, and may, we think, be made a ground of exception, if the exception be properly framed.” In that degree at all events there is, in my opinion, misdirection in the charge; but I go further, and think there is misdirection, positive and direct, in letting the case go the jury at all, especially with an intimation that there *was* evidence on which they might find for the plaintiff.

But the question still remains, are the exceptions properly pointed to the correction of the error? I have already anticipated almost all I need say upon this. It was insisted that, in order to raise the point which the defendant relies on, the exceptions ought to have called on the CHIEF JUSTICE to tell the jury that there was no evidence. Well that is precisely what is done by the third exception, with this difference, that it is prefaced by a definition of what the proof, if any, ought by law to have been. That exception simply called on the Judge to tell the jury this, that nothing but proof of uniform, uninterrupted, public profession by both parties for twelve months could validate the marriage; and that there was no evidence of any such thing in the case of Major Yelverton. These are the two propositions which the third exception embodies; they are both, in my opinion, as I have already I hope shown, strictly correct, and they hit precisely the error in the charge. I am therefore of opinion that the third exception ought to be allowed.

The fourth exception should also, in my opinion, be allowed.

(a) 6 H. of L. Cas. 996.

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T. T. 1862. It differs from the former in this respect, that while *that* relies  
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 upon the defect of the plaintiff's evidence, *this* rests upon the  
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 defendant's own proof. It called upon the CHIEF JUSTICE "to  
 YELVERTON. tell the jury."—[His Lordship read the exception.]

The point of this exception is in the words "that he did so as a professing Protestant." If the jury came to that conclusion, the case would be within the very terms of the statute,—and no other conclusion was in my mind possible upon the evidence. This direction alone, if it had been given, would have neutralized the error in the charge.

The fifth exception remains. The real objection to the part of the charge to which it refers, is in the hypothesis on which it proceeds, namely, that there was evidence on which Yelverton might be found to have been a Catholic. That I have dealt with on the two former exceptions. But assuming that hypothesis to be correct, I cannot say that the passage excepted to is objectionable. It simply adopts the direction in *Kirwan v. Kirwan*, as to what act of profession of Protestantism, done by a proved Catholic, will be sufficient to bring him within the statute. Mr. Ball contrasted the expression "unequivocal religious act" with the words in *Kirwan v. Kirwan*, "unequivocal profession." The distinction is however more subtle than sound; and on the whole, having regard to the supposition on which the CHIEF JUSTICE was proceeding on this point of his charge, I think the fifth exception ought to be overruled.

The result of the whole then is that, in my opinion, all the exceptions relating to the Scotch marriage, and one of those relating to the Irish marriage, should be overruled, but that two of those relating to the Irish marriage should be allowed. Ordinarily in that state of things, if such were the opinion of the Court, a new trial would be as of course. But in the way of that, in this case, a point of considerable novelty and importance is interposed, which I am now under the necessity of considering, and which is occasioned by the very novel form in which this record has been made up.

By the practice in this country, as prescribed by the statute 28 G. 3 (*Ir.*), c. 31, a bill of exceptions is not, as in England, a detached document, but is incorporated with the *postea*. The

course is, or ought to be, as laid down by the statute, that after the Judge has signed the bill of exceptions it is deposited with the clerk of Nisi Prius, and he, the clerk, afterwards makes up the *postea* and incorporates into it the already completed bill of exceptions. This is pointed out by Baron Parke, in *Bank of Ireland v. Evans's Charities* (a); and indeed in theory the bill of exceptions is supposed to be complete even before the verdict is handed in by the jury. Accordingly the record before us commences and ends as an ordinary *postea*, but has incorporated into it the bill of exceptions. From the commencement "afterwards," &c., down to the swearing of the jury, it is the *postea*. Then commences the bill of exceptions, "the plaintiff produced and examined," &c., and so it goes on through the evidence, the charge and the exceptions, down to the words at page 68 of our books—"Whereupon the Counsel for the defendant made the several exceptions," &c., and "the case was notwithstanding left to the jury," &c., &c.; and then ends the bill of exceptions, properly so called. Then the *postea* resumes by stating the verdict of the jury, and continuing to the end. I should observe in passing, that the signature of the Judge, together with the clause to which it is immediately appended "and inasmuch as," &c., is misplaced; it ought to follow immediately the close of the bill of exceptions and precede the verdict, instead of being placed as it is at the foot of the *postea*. That however is but form. The important peculiarity of the present record is this, that interposed between the close of the bill of exceptions and the entry of the verdict on the issues, occurs this clause:—"Whereupon the jury, having returned "to Court, found that a marriage, valid according to the law of "Scotland, was contracted between the defendant Major Yelverton "and the said Maria Theresa Longworth, in Edinburgh, in the "month of March 1857. "That a marriage, valid according "to the law of Ireland, was celebrated between the same parties in the Roman Catholic chapel of Killowen, in the month "of August 1857."

Upon that the question I have now to consider arises. The

(a) 5 H. of L. Cas. 405.

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plaintiff insists, that as it thus appears on the record, that the jury have found the Scotch marriage to be valid; the consequence is that, if all the exceptions to the charge as regards that are overruled, the Irish marriage will become immaterial, and he will, in all events, be entitled to retain his verdict. On the other hand, the defendant insists that these findings make no difference in the case, and that the allowance of any of the exceptions must be followed by the usual consequence of a trial *de novo*. He says, the Court cannot take judicial cognizance of those findings at all; that they have been placed upon the record contrary to practice, and in opposition to authority; that nothing is of the verdict but the findings upon the issues and the ascertainment of the damages; and that the Court can no more discern judicially with these interpolated findings than it could without them, upon what marriage in particular, or upon what piece of evidence in particular, *that* verdict was founded.

It will be in the recollection of Counsel, that before the exceptions were argued last Term, a motion was made to the Court to expunge these findings. A majority of the Court were of opinion that *the Court* was not competent to entertain such a motion; upon the ground that the Judge at Nisi Prius is alone responsible for the *postea* or the bill of exceptions, and that the Court must receive it as he pleases to frame it. I was of opinion that that principle did not apply to a case like this. The record remained unaltered, but we all expressly reserved the right of considering, when disposing of the exceptions, if it should become necessary, the propriety and the legal effect of these findings. And I take leave now to say that, the more we assume the opinion of the majority of the Court as expressed upon that motion to be correct, namely, that the Court cannot help itself, but must accept at the hands of the Judge of Nisi Prius the record it had sent him to try, with anything whatever which he may think proper to put there, and without power to alter a line of it—the more necessary it is that, when the Court is called upon to found its own judicial action upon that record, it shall assert and exercise the right to

examine, to scrutinise, to criticise this novelty, and, if it see fit, to utterly ignore and reject it.

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Well, then, what is it that has been done in this case? The first thing that startles one about it is, that not one single instance, in the whole range of English or Irish reported law, has been produced, in which it was ever done before. I say advisedly, *not one*; not forgetting *Nepean v. Doe*. In our own country, it was not even pretended that it had ever been done before. Well, then, why is that? The occasions for doing it, if it was a right or proper thing to do, have been multitudinous. There is not an Assizes or an After-term Sittings in which cases do not arise in which the Judge, when all the evidence is before him, will extract certain questions on which the case hinges, and present them to the jury, telling them that, according as they find them, so shall they find their verdict on the issues; or that, when they give him their answers upon them, he will be enabled to direct them how their verdict on the issues should be entered. Nothing is more common. And he will take care to enter it on his note-book that he has put those questions, and how they have been answered; and in case of a motion for a new trial afterwards, they will be available to the parties, on the Judge's report, and may legitimately influence the discretion of the Court in determining whether a new trial shall be granted. But I appeal to the experience of the Bar and the Bench, whether they have ever known an instance, before the present, of the Judge having placed *upon the postea, as if a part of the verdict*, the opinions of the jury upon these subsidiary questions? And if no such instance can be shown, either here or in England, how is that to be accounted for? Simply, by this, that it would be contrary to principle, and to the very nature of a trial by Nisi Prius. The office of the *postea* is to contain the verdict of the jury, and nothing else. But nothing is the verdict of the jury but their findings on the issues sent to them for trial on the record of Nisi Prius. It is on these, and these only, that they have any authority in law to make findings. So much is this so, that I apprehend their findings on these collateral subjects would not even be evidence between these two parties in any other proceeding. If, for

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example, it becomes an object to Mr. Thelwall to prove, in another action, that it was in Scotland, in April 1857, that the parties were really married, and not in August, in Ireland, I do not think their finding would be even admissible in evidence for that purpose; because it is only the opinion of the jury on a question not sent to them to try, on which unanimity was not necessary to their verdict on the issues, and which is not, or will not be, confirmed by any judgment of the Court. The issue which the jury had to try was simply this, was this lady the defendant's wife when the necessities were furnished, in 1861, or 1860, or 1859, as the case may be? It was no part of their duty or function to find *when* or *where* she was married—whether it was in Edinburgh, in April 1857, or in Killowen Church, in August 1857. These ceremonies were simply pieces of evidence in the case. I retain the opinion which I expressed on a former occasion, although it seemed then to occasion a good deal of surprise, that it was perfectly unnecessary to the finding of a verdict on the issues, that the jury should have been unanimous on either of those evidentiary facts; and that, if some of them went upon the one, while others of them went upon the other, the Judge would have had no more right to refuse to receive their verdict than if some of them believed only the evidence of one witness and others only that of another: and I find I am borne out in this by Mr. Justice Maule, in *Davies v. Lowndes* (a), as well as by the older case in *Vaughan*, p. 150. Fortunately, we are not driven to rest in this matter upon the negative argument, founded on the absence of precedent, or upon reasons drawn from principle. Though there is no case in which it was ever done, there is one in which it was attempted—a case of the very highest authority, and perfectly conclusive on the point; I allude to the case of *Davies v. Lowndes*. The motion there was, that the findings of the jury, on the collateral questions which had been left to them at the trial, should be entered on the record. The Court was strongly pressed there with the same argument which prevailed in this case when the record was being made up, namely, that the answers to some of the questions rendered immaterial the subject of

(a) 1 Man. & Gr. 473.

some of the exceptions, and that the party had a right to have that shown on the record: but the rule was discharged, after a *Curia advisare vult*, upon the ground that, however convenient such a thing would be for the party, it was unwarranted by principle or practice. The Chief Justice, Tindal, takes care to point out that, although that was a writ of right and a bill of exceptions, if the motion were granted, the same thing must be done in every civil or criminal case, contrary to all established usage. But it was said that that case was quite distinguishable from the present. How? Simply in this, that the Chief Justice there, at the trial, though he left the collateral questions to the jury, did not tell them he would ask them for their answers: whereas here the Chief Justice told the jury he would require their answers, and the defendant's Counsel did not object. Can it be seriously said that this makes any distinction? The complaint is not of what was done at the trial. The Chief Justice had a perfect right to put the questions, and to ask for and receive the answers of the jury; and an objection to his doing so would have been simply ridiculous. The thing complained of is something that was done months after the trial; which was, properly speaking, not the act of the Judge at all, but of the clerk of Nisi Prius, when making up the *postea*—i. e., the entering these answers of the jury on the record. It is idle to pretend that *Davies v. Lowndes* is not in point against that. An older case, not cited in *Davies v. Lowndes*, *Bushell's case* (a), is to the same effect. With respect to *Nepean v. Doe* (b), which was cited in opposition to those authorities, I shall only say that I do not believe that the answers to the collateral questions were placed on the record at all. The report does not profess to transcribe the record; and it would be easy to demonstrate, as any one may do who will carefully read the case, that there is not a word, either in the reporter's narrative or the Judge's observations, which would not equally be there on the contrary assumption. But it is not worth while to dwell on that; because, if the point did exist in that case, it was not taken; it passed in silence. It is needless to say that such a case can be of no value on this point, in opposition to the later and well-considered

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(a) Vaughan, 150.

(b) 2 M. & W. 894.



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 YELVERTON. decision in *Davies v. Lowndes* on the very matter. It is clear that these two findings have been placed upon the record in violation of authority, of principle, and of practice; and how ought this Court now to deal with them? In my opinion, by ignoring their presence, and making our rule upon the case precisely as we would have done if the *postea* contained nothing but the verdict of the jury upon the issues joined on the record.

I must now add in conclusion, that although I have said so much about these findings, in deference to the importance which I know to be attached to them, I do not myself see how they at all improve the plaintiff's case. We are, to my mind, under precisely the same uncertainty as to the ground this verdict rests on, with them, as we should have been without them. They are palpably destructive the one of the other. If the Scotch marriage be valid, the Irish one must necessarily be void. If the Irish marriage be valid, it can only be because the Scotch one was void. A marriage between two people who are already husband and wife is a mere nullity. The CHIEF JUSTICE warned the jury of this, and told them, if you find the Scotch marriage good, have nothing to do with the Irish one. But the jury, overborne by I know not what influence, under which they set at nought alike the charge, the evidence and consistency, gravely affirmed these two propositions, the co-existence of which is impossible. One of their findings is necessarily and hopelessly wrong. But it is on whichever of them was right (if either was), that this verdict for £259. 17s. 3d., and the judgment we are now called on to pronounce for the plaintiff, must rest: which of them is that? I defy anyone to tell. Placing them on the record has only rendered the vice of the verdict the more incurable. Mr. *Whiteside* argued strenuously that we should reject the second finding, on the principle *utile per inutile non vitiatur*. But the difficulty here is to tell which, in the mind of the jury, was the *utile* and which the *inutile*. Both the findings have their utterance *uno flatu*. In the same breath in which they tell us that the Scotch marriage was valid, they tell us that the Irish marriage was valid; which is to say, in other words, that the Scotch marriage was void. The only possible way of avoiding this fatal repugnancy is by

totally transforming the language of the second finding, and understanding it as if it ran thus—"We find the Scotch marriage valid, "and for that reason we find the Irish marriage invalid; but we "further find that, if we had not found the Scotch marriage valid, "we *would have* found the Irish marriage valid." But you cannot paraphrase the finding of a jury in that way, you must take it as you have it. Or suppose you could now substitute, in place of the second finding, what I have just read, see what a record you would have. A record which I will venture to say would be almost as great a curiosity as the case itself from which it sprung; and which, if it ever went to another country, would probably there provoke some of those comments, which we sometimes hear of, upon the eccentricities of our Irish procedure.

For these reasons I am of opinion that a new trial should be directed.

KROGH, J.

I have little to add to what has already been urged, either by way of argument or illustration. As to the two first exceptions, which relate to the Scotch marriage, we are all agreed that the direction was right. The question was entirely one of foreign law; and therefore, as a matter of fact, to be left to the jury, as any other matter of fact, with such intimation as the Judge thinks proper to give, but not by way of direction. The first and second exceptions seek to withdraw these questions from the jury, and must be overruled. As to the Irish marriage, it turns altogether on the meaning of words used in the 1st section of the 19 G. 2, c. 13.—[His Lordship read it.]—The preamble to that is as follows:—"Whereas the law now in being, to prevent Popish priests "from celebrating marriages between Protestant and Protestant, or "between Protestant and Papist, have been hitherto found ineffectual; "for remedy whereof," &c. Upon the construction of that statute, the charge of my LORD CHIEF JUSTICE was as follows:—"It appearing that Major Yelverton was born of Protestant parents, and "had in his youth been brought up a Protestant, the presumption "of law was, that he continued such; and therefore to find in

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T. T. 1862. *Common Pleas* "favor of the alleged Irish marriage, *they should, on the evidence,*  
 "be satisfied that, twelve months before the 15th day of August  
 THELWALL "1857, he had ceased to be a Protestant, and become a Roman  
 v. YELVERTON. "Catholic; and that he had not, within those twelve months, been,  
 "or professed himself to be, a Protestant; and though they should,  
 "on the evidence, be satisfied that the defendant Major Yelverton  
 "had, in reality and fact, been a Roman Catholic during twelve  
 "months preceding the 15th of August 1857, still that if, within  
 "that period, he professed himself to be a Protestant, the alleged  
 "Irish marriage would be null and void;" and he directed their  
 attention to the evidence in the case applying to this question,  
 namely, Major Yelverton himself, and the other witnesses, who had  
 proved his attendance at Divine worship in the Episcopalian church  
 at Leith and Edinburgh, in the early part of the year 1857; and the  
 evidence of Archdeacon Knox and Mr. Dwyer, who deposed to his  
 having attended Divine service in the church of Larrha, in the  
 months of May and June 1857: and he further informed the jury  
 that "a profession of Protestantism, within the Act, such as he  
 "was calling their attention to, was the doing of any unequivocal  
 "religious act, inconsistent with the party doing it being a Roman  
 "Catholic."

To that the defendant excepted, as follows.—[His Lordship read the third, fourth, and fifth exceptions.\*]—These are the exceptions, and it is plain they entirely turn upon the meaning to be attached to the words "who hath been a Protestant, or hath professed himself to be a Protestant," in the Act of G. 2. But this Act of G. 2 is but part of a code called "penal," one of a series of enactments which extend over the reigns of William 3, Anne, and the two first Georges; and have their root much further back in the constitutional history of the country. To trace the parentage, and, as it were, the legal pedigree of these enactments, we must go further than to the successors of the Stuarts, or the reigns of the Stuarts. They had their origin at the Reformation. Up to the time of the Reformation the Roman Catholic religion was the religion of the State, and every departure from that religion was punished as a

\* See ante p. 190.

crime. At the Reformation, and especially under Elizabeth, Protestantism became the religion of the State; and, like its predecessor, made any desertion from its ranks a criminal offence. The Statute Law did, after the Reformation, for Protestantism, what the Canon Law had done before it for Roman Catholicism. From the statutes of *Edward the Sixth*, and especially from the 1st of *Elizabeth*, every subject of the Crown was, or was supposed to be, though in fact they were not, Protestants. Then Protestantism had the true commencement of its legal existence. Let it not be supposed that by this I mean, that then, for the first time, or in the fifteenth or fourteenth century, Protestantism itself existed. I am far from thinking so, either as to England or elsewhere. According to my notions, he who reads history aright will find that Protestantism, in its noblest sense, as embodying the struggle against prescriptive authority and ecclesiastical domination, for the liberty of private judgment, and freedom of opinion in matters which should be, of all others, beyond man's control, was almost coeval with Christianity itself: but it is legal Protestantism in England with which we have to deal; and I think I speak correctly in fixing its origin at the period to which I have alluded. And from its very birth, either influenced by the animosities common to all sects, or coerced by the difficulties and dangers of the time, "*res dura et regni novitas talia cogunt*," legal Protestantism at once armed itself with all the weapons of the criminal code. If we refer to the Uniformity Act, the 2 & 3 *Edw.* 6, c. 1; to the 6 *Edw.* 6, c. 1; the 1 of *Eliz.*, c. 2; as well as that of *Car.* 2, which re-enacted all the penal clauses of the former Acts, we shall find a code as stringent and as cruel as can well be conceived, enacted to prevent the possibility of dissent: and so, from that period to the Acts of Toleration (the 1 of *W. & M.* in England, the 6 *G.* 1, c. 5, in Ireland), even Protestant dissent from Church of England Protestantism, not to speak at all of Roman Catholics, was expressly under the ban of the law. The Acts to which I have referred, as well as the Corporation and Test Acts, establish this proposition, which is judicially recognised and commented upon by

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 YELVERTON. the present Master of the Rolls, in *Evans v. Cassidy* (a). From the passing of the Toleration Act, a new era commenced: dissent was, to a certain extent, recognised, although occasionally subjected to very biting legislation; as by the Act against occasional conformity, and the Schism Act of the 1 & 6 of *Anne*. But for Roman Catholics, during the whole of these two periods, there was neither toleration nor recognition, except for purposes of degradation and punishment, forfeiture and disability, until the Acts of 31 *G. 3*, c. 32, in England, and the Act 33 *G. 3*, c. 21, s. 11, which provided that a Roman Catholic should not be subject to a penalty for not attending Divine service in the parish church. These were the first toleration Acts for the Roman Catholics. Such, then, having been the historic eras of Catholicism and Protestantism, I entertain but little doubt that the Act of the 19 *G. 2*, c. 13, when it was enacted, had but two out of three classes of persons to operate upon—firstly, the legal Protestant, professing the religion of the State; secondly, the Protestant Dissenter, recognised and tolerated since the Act 6 *G. 1*; and, thirdly, the Roman Catholic, neither tolerated nor recognised, except, as I have already said, for purposes of degradation, punishment, and disability. Who, then for the purposes of the 19 *G. 2*, was a Protestant? I answer—firstly, any Protestant, born, reared, and educated a Protestant, of the religion of the State; secondly, any person educated a Roman Catholic, but who had legally conformed, and filed his certificate of conformity, thereby acquiring the rights of legal Protestantism, and escaping from all the disabilities of Roman Catholicism; thirdly, any Protestant Dissenter, now thoroughly recognised by the State, since the Act of Toleration. I know of no other class, as recognised by law, to whom the words “hath been a Protestant” could apply, at the passing of the Act of the 19 *G. 2*; and I am therefore driven to think, by a process of exhaustion, that the Act, when it added the expression “who hath professed himself to be a Protestant within twelve months,” must have intended Roman Catholics who, without conforming, had so professed themselves; and for this proposition the case of *Kirwan v. Kirwan* (b), and that of

(a) 11 *Ir. Eq. Rep.* 250.(b) *Batty*, 712.

*O'Connor v. M'Cann* (a), is ample authority. Well, if this be so, the statute clearly intended to invalidate the marriage, not only of any Protestant, but of any Catholic who had, at any time during the twelve months preceding the marriage, professed himself a Protestant—that is, who had, at any time during the twelve months, ceased to be a Roman Catholic. It therefore required that, for that period of twelve months, both the contracting parties should have been, absolutely and continuously, and without any deviation into Protestantism, Roman Catholics: for if, at any time, either had so deviated, then he had, at some time within the twelve months, professed himself to be a Protestant, and so brought himself within the disabling clause of the Act; and his marriage was null and void, to all intents and purposes. If this, then, be the true construction of the statute, as I humbly think it is, that both parties should have been Roman Catholics for twelve months previous to the marriage, it takes us at once to the broad real question in this case, in my mind, the only question, what was the religion professed by Major Yelverton for the twelve months previous to the 15th of August 1857? Now if this alone had been the question to be tried, that there had been no disturbing element, no romance in the case, can any one doubt what the direction should have been? Here was a man born of Protestant parents; baptised in the religion of the State; educated a Protestant; entered as a Protestant in her Majesty's service; reading the Protestant service for her Majesty's troops; attending his men to the Protestant Church; regularly going to the Protestant Church during every year of his life, down to that very year in which this marriage ceremony was performed; going there with his Protestant relatives; seen there by his Protestant pastor; aye, and upon this very 15th of August 1857, in the church of Killowen, in reply to the Roman Catholic clergyman, the witness produced by the plaintiff, who asked him "Are you a Roman Catholic?" answering "*I am not.*" "What are you then?" "I am a Protestant Catholic." A Protestant and a Catholic; a Catholic but a Protestant,—the very language which we all know is adopted by the great body of those

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(a) Milward, 204.

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**YELVERTON.** who profess the Protestant religion in this country. Against this body of evidence, what was there to put to the jury? The simple statement of the person claiming to be the defendant's wife, that he had told her, within the period of six months, that he was *not a Protestant; that he did not believe in it; "I never did."* Is this evidence to be submitted to a jury, as establishing the indisputable fact that he been a Catholic for twelve months before the 15th of August? Mark I am dealing with a legal Protestant, a Protestant by birth and education, not by conformity or profession. If he had been a Catholic, and that it was sought to invalidate his marriage with a Catholic, could that have been done by proving declarations of Protestantism within twelve months, to the person seeking to invalidate this marriage, such as that he was a Protestant, that he was not a Catholic, and that he did not believe in it, and never did? Would this have been sufficient? I answer no; and I say with Dr. Radcliffe, in *O'Connor v. M'Cann (a)*,—"It would be monstrous to hold that a merely private verbal or written declaration would suffice to constitute profession; for this reason, that such declaration might be secretly made within twelve months, purposely to lay a ground for avoiding the marriage." With Judge Vandeleur, in *Kirwan v. Kirwan (b)*, I say that such profession must be an unequivocal one, such as receiving the sacrament, or attending the religious rites of the Protestant Church, or performing acts of religious duty such as a Roman Catholic would not do. But if such a declaration could not for a moment be listened to as constituting a profession of Protestantism within twelve months, so as to invalidate the marriage of one who had been reared a Roman Catholic, with a Roman Catholic, shall, it be entirely sufficient to carry a man from the religion of the State to the Roman Catholic creed, when construing the very Act which was framed for the purpose, if possible, of confining Roman Catholic marriages within the narrowest limits, and so leading to the gradual extinction of Roman Catholicism? Well if this is to be, we shall, under this Act of G. 2, be conferring privileges, not disabilities, on Roman Catholics: we shall be making the road to Roman

(a) Milward, 212.

(b) Batty, 716.

Catholicism easy instead of difficult. Profession in the one case may be both private and verbal, while in the other it shall be public and notorious. To get from a religion essentially based upon the liberty of private judgment and freedom of opinion, to one of elaborate ceremonial and absolute submission, the smallest act shall be laid hold of; whilst to escape from that religion of ceremony and submission, to enrol yourself in the ranks of the religion of the State, shall require acts, public, notorious, unequivocal, such as no Roman Catholic could do; and all this, although in the one case the State, by every means in its power, sought to encourage a departure from the Roman Catholic creed, by many enactments, and especially by one of this very code, the Act of 2 *Anne*, c. 6, in force at the passing of the 19 *G.* 2, which provided "That any person seducing, persuading or perverting any person professing the Protestant religion to renounce or forsake the same, and to profess the the Popish religion; then in such case every person so seducing, as also every Protestant who shall be so seduced or perverted, shall for the said offence, being convicted thereof, incur the danger and penalties of præmunire mentioned in the Statute of Præmunire made in the reign of King Richard the Second." Yet I respectfully think the tendency of my LORD CHIEF JUSTICE's charge, the necessary result of it, was to lead the jury to a conclusion of this nature, in fact to assume that there was sufficient evidence of Major Yelverton having adopted the Roman Catholic religion; whereas I consider that there was no evidence of any kind to warrant the conclusion that he had ever abandoned his legal Protestantism, *i. e.*, he had ever been a Roman Catholic, much less that he had been so for a period of twelve months *publicly, uniformly and uninterruptedly*; all of which was in my mind necessary to sever his connection with the faith in which he was reared, the Protestantism in which he was born, the religion of the State. Judge Radcliffe said, to constitute a profession of Protestantism the profession is to be evidenced by some act of outward conformity, public and notorious, some public and unequivocal act. Judge Vandeleur said, the profession must be unequivocal: and my LORD CHIEF JUSTICE himself said in this case, that the profession should be the doing

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of an unequivocal religious act, inconsistent with the party doing it being a Roman Catholic. All these definitions I apply to Roman Catholics, and they lead me to the conclusion that, to make Major Yelverton a Catholic, within the statute, his profession must have been public; and being so, the very words of the Act (more pointed by their exceptional character than if given directly), require that the profession should be for twelve months uniform and uninterrupted; and those are the words of the third exception. What is the answer to this? It is remarkable that we have no case of an undoubted Protestant whose marriage, by such a lapse into Roman Catholicism as here, has been validated; and the only case suggested is, the possibility of a man born a Protestant, reared a Protestant, who reads his recantation publicly, or receives the sacrament according to the Roman Catholic rite, and then has continued locked up for the twelve months without any expression or demonstration of a religious nature before his marriage with a Roman Catholic. It is asked would this marriage by a Roman Catholic priest be held invalid? and it is further said that here there could not be any profession of Catholicism, public, uniform and uninterrupted, during the twelve months preceding marriage. If I am obliged to assume such a case, I say it is not the case before us, nor like it. That is the case of a public profession, open and notorious, of the Catholic religion, before the twelve months began to run. In such a case I am not satisfied that the publicity and notoriety of the profession would not be held to apply, in the absence of evidence to the contrary, to the whole of the time intervening between that time and his subsequent marriage. I think it would, and if so, it would necessarily follow, from the circumstances of the case put, that his profession must be held uniform and uninterrupted, for there could be no evidence of deviation. But however that may be, should such a case arise, I would deal with it when it comes before me, and I will not allow myself, in the very difficult circumstances of this case, to be embarrassed by so whimsical a possibility; *nolo sic sapere*—so happily translated by Sir William Grant, “I do not desire to be thought wise in such

conceits." I therefore am of opinion that the third exception should be allowed.

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Then, as to the fourth exception, nondirection, if the direction required be necessary to complete a direction which in itself is incomplete, may amount to misdirection: and this is the view I take of that part of the CHIEF JUSTICE's charge which deals with the attendances of the defendant at the Protestant Churches of Scotland and Ireland. By itself it would, in my mind, lead the jury to think that such attendances by a born and legal Protestant were not sufficient to constitute a profession of Protestantism: a defect which would have been removed by putting before the jury the fact of those attendances having taken place as a professing Protestant. I am therefore of opinion that this exception should be allowed.

The fifth exception should, in my mind, be overruled. It is entirely at variance with the reasoning upon which the two other exceptions are sustained; and I do not think it necessary to repeat that reasoning.

Then, as to the separate findings I do not think that they should stand in the way of a *venire de novo*. They appear to me to be in themselves contradictory; and they certainly were in contradiction to the directions of my LORD CHIEF JUSTICE, who once and again told the jury that if they found for the Scotch marriage, they need not and should not trouble themselves with the Irish marriage. And I think it would be a denial of justice to hold that those findings, which were eliminated with a view to prevent confusion, and for that purpose only, should now debar the defendant from all remedy in this record.

BALL, J., briefly expressed his opinion that the several exceptions should be overruled; adding, that he considered the first four were likewise defective in point of form.

MONAHAN, C. J.

The general facts of the case are so well known, and have been so accurately stated by the Members of the Court who have pre-

**T. T. 1862.** ceded me, that it is sufficient to state that the action is brought for  
*Common Pleas* necessities supplied by the plaintiff to a lady whom he alleged to  
**THELWALL** be the wife of the defendant. It was admitted, at the trial, that  
*v.* the necessities were supplied, of the value stated by the plaintiff;  
**YELVERTON.** that the defendant had left the lady unprovided for; had married  
 another; and the only question was, whether the lady in question  
 was the wife of the defendant? She was the principal witness for  
 the plaintiff; and was examined and cross-examined at very consi-  
 derable length. The case deposed to by her was, that in the month  
 of March or April 1857, she was lodging in Edinburgh, the defend-  
 ant being quartered with his regiment at Leith, in the neighbour-  
 hood; that some time in the month of April 1857, the defendant,  
 being in her room at Mrs. Gamble's, called her to him, and that  
 they both read the marriage service; and having read it through,  
 the defendant took her hand and said, "that makes you my wife,  
 according to the law of Scotland." No third person was present.  
 Miss M'Farlane was in an adjoining room; that when they had  
 finished reading the service, and defendant said "that makes you  
 my wife," defendant opened the door of the room, and witness  
 exclaimed to Miss M'Farlane, in defendant's presence, "we have  
 married each other;" and, on cross-examination, she stated that,  
 at the time of, and after, such mutual acknowledgment, she considered  
 herself his wife by the law of Scotland, but not in fact, as she had  
 scruples of a religious nature. He insisting on the rights of a  
 husband, which she would not allow until a further ceremony by a  
 Roman Catholic clergyman; which ceremony, she stated, was cele-  
 brated in the Roman Catholic chapel of Killowen, on the 15th  
 August 1857, by the Rev. Mr. Mooney, the Roman Catholic priest  
 of the parish; and which ceremony, according to the concurrent  
 testimony of the lady, the defendant Major Yelverton, and the Rev.  
 Mr. Mooney, was in every respect a valid marriage ceremony,  
 according to the usage of the Roman Catholic Church, if the parties  
 had not already been married, and were under no legal disability  
 arising from the religion of the parties. As the only objection to  
 the validity of this latter marriage arose from the alleged religion  
 of the defendant Major Yelverton, it will be necessary to refer

shortly to the evidence on which the plaintiff relied as to his being a Roman Catholic at the time. Mrs. Yelverton stated that, shortly after the alleged Scotch marriage, she went to her sister's in Wales, with whom she remained till the latter end of July or beginning of August, when, by appointment, the defendant Major Yelverton met her in Waterford, and told her he had been looking for a Roman Catholic priest to marry them; that they had better go to Thomastown for the purpose; which they did, but, on inquiry, found that the priest was absent from home, and would continue so for some time; that they came to Dublin, and from Dublin went to Newry and Rostrevor; that, on the Sunday, they went to mass together at Rostrevor; that the defendant joined in the Roman Catholic worship; that they were unable to see the priest, as they intended, after mass; that the defendant, having occasion to go to Dublin, she, in his absence, saw the Rev. Mr. Mooney, and arranged with him for the marriage; that a dispensation was obtained from the bishop, to suspend the necessity of a publication of banns; that, in pursuance of the arrangement so made, she and the defendant went to the chapel of Killowen, on the 15th of August; that, having delayed too long, they were late for mass, but got to the chapel immediately after, where they found Mr. Mooney waiting for them; that Mr. Mooney asked them "Are you free to marry?" to which they replied that they were; that he then asked the defendant "Are you a Catholic?" to which he replied, "I am; but I am afraid, not a very good one;" and further said "I am no Protestant;" and therefore that the Rev. Mr. Mooney celebrated the marriage in the usual form. She further stated that the defendant went to mass with her at Warrenpoint, and that she had seen him twice before at mass in Edinburgh, and that he went through the ceremony, and took part in the worship, on these occasions, "the same as any other Catholic would do;" that he had told her he was not a Protestant, and that he believed in the Catholic doctrine, though he did not practise it; that in his conversations with her, previous to the ceremony in Ireland, defendant was in the habit of making fun of the Protestant religion; that he said part of his family were Roman Catholics; witness believed his grandmother

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**YELVERTON.** velled, in Scotland and on the Continent, as Mr. and Mrs. Yelverton,  
 and that their passports were so made out, and they were received  
 everywhere as husband and wife; that, in her letters to him from  
 that time she always called him her "My dear husband;" that  
 he introduced her, to acquaintances he met travelling, as his wife,  
 but that he wished to have the marriage kept secret from his family,  
 to which she assented. On cross-examination, she stated that when  
 she met the defendant at Naples, long before the marriage, her  
 impression was that the defendant was a Catholic; but that, until  
 the defendant, in February or March 1857, told her he was a  
 Roman Catholic, she had no distinct idea that he was one; but  
 that, from that time, she thoroughly believed that he was a Roman  
 Catholic; that she did not tell Mr. Mooney, or any one else, either  
 in confession or at any time, that the defendant Yelverton was a Pro-  
 testant; that at that time she believed him to be a Roman Catholic;  
 that, on two different occasions, she saw the defendant at mass in  
 Edinburgh, once in uniform, and on the other occasion in plain  
 clothes; that he had not gone with her to the chapel, nor had  
 she spoken to him there; that when in Edinburgh she wished they  
 should be married by a Roman Catholic priest, to which he had no  
 objection, if it could be done with safety—that is, without publi-  
 city, but he feared that it would get publicity; that up to that time  
 she had not given any serious thought about his religion, but then  
 asked him about it, and he said he was a Catholic; he said part of  
 his family were Protestants and part Catholics; he said his mother's  
 family were Catholics; witness had heard his father was a Protest-  
 ant: she thought the defendant had told her he had originally been  
 a Protestant; that it was before reading the marriage service at  
 Edinburgh he told her he was a Roman Catholic; that she then  
 entertained no doubt but that he was such; that she ever after  
 believed him to be such; that he asserted himself to be a Roman  
 Catholic, and if by profession is meant assertion, he certainly pro-  
 fessed to be a Roman Catholic, but that, as to his practising it, she  
 never understood that he went to confession or received the sacra-

ment, but that he went to mass, as stated in her direct evidence ; T. T. 1862.  
 that, on being asked how he was baptised, he said he did not *Common Pleas*  
 remember ; that she said, if he had a doubt about it, he ought to **THELWALL**  
 be baptised again, and asked if he had been confirmed ; he said he **v.**  
 had not ; she said, if so, she thought he was no Protestant unless he **YELVERTON.**  
 believed ; he said, " I don't believe it now, and never did ; " defendant  
 told her he believed in the doctrine of confession and absolution ;  
 that before the celebration of the marriage by Mr. Mooney, she said  
 to him she feared the defendant would not go to confession, when  
 Mr. Mooney said he must pass it over, or something to that effect.  
 She further stated that she considered him a Roman Catholic, not  
 because she saw him at mass, but because he told her so himself ;  
 that though, when in Edinburgh, she believed the defendant to be  
 a Roman Catholic, she was not surprised at his reading the Church  
 of England marriage service, as it was a mere accident ; that it was  
 in a Protestant Prayer-book that was on the table ; that the defendant  
 never thought whether it was Protestant or Catholic, and witness  
 thought it immaterial, as the ceremony was to satisfy the Scotch  
 law, and not religion. This witness also stated that after the Irish  
 marriage, while travelling on the Continent together, the defendant  
 always attended Roman Catholic places of worship.

The plaintiff Mr. Thelwall was also examined as a witness, and  
 stated that he received the parties as husband and wife after the  
 month of August 1857, and the defendant told him he had received  
 a letter from his sister, telling him that she had heard he had become  
 a Roman Catholic, and that he must have been seen at a Roman  
 Catholic chapel.

Mr. Goodlift, a friend and acquaintance of the defendant,  
 stated he met them at a hotel in Dunkirk in 1858, when defend-  
 ant introduced the lady as his wife, and stated that they had  
 been previously married.

As to the Scotch law, in relation to the validity of the alleged  
 Scotch marriage, plaintiff examined as a witness Mr. Lancaster,  
 an Advocate of the Scotch Bar, who deposed that according to  
 the law of Scotland all that was required to render a marriage  
 valid was, that the parties should deliberately consent to take  
 each other as husband and wife ; that the presence of a witness

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was not necessary to the validity of the marriage; that if the consent were once given it could not be revoked; that cohabitation was in no way necessary: and he further deposed that when a solemn matrimonial consent had been interchanged, the fact that one of the parties, from religious scruples, refused cohabitation until a further matrimonial ceremony before a clergyman was gone through, would not invalidate the effect of the consent as constituting a valid marriage.

In answer to this case so proved by the plaintiff, the defendant examined as a witness Mr. Pattison, an Advocate of the Scotch Bar, who stated that, in his opinion, to render valid an irregular Scotch marriage *per verba de presenti*, the consent of the parties should be evidenced by some writing, signed by the parties or proved by a witness who was present; and that a consent entered into between the parties, in the absence of a third person as a witness, would not be sufficient to constitute a valid marriage. He further stated that the refusal of one of the parties to allow cohabitation until a further religious ceremony was gone through, would not invalidate a previous marriage engagement solemnly and deliberately entered into; but that such refusal would be considered strong evidence that no such engagement had been in fact entered into.

The defendant was also examined as a witness in his own behalf; he denied the fact of the alleged Scotch marriage as deposed to by Mrs. Yelverton; he admitted the fact of the Irish marriage by the Rev. Bernard Mooney; but he stated that he was at all times a Protestant, and never was a Roman Catholic; that he attended the Roman Catholic chapel in Edinburgh, as deposed to by Mrs. Yelverton, for the purpose of hearing her sing in the choir; and that he consented to the ceremony performed by the Rev. Mr. Mooney, not for the purpose of constituting a valid or binding marriage, but merely to satisfy the scruples of the lady. He produced also several witnesses who proved that he had been educated and brought up a Protestant, that his father and mother were Protestants; and that when with his regiment he attended the service of the Established Church with the men, when it was his duty to do so; and also that during the year before the ceremony by Mr. Mooney, he attended the Established Church services on several occasions. I do not

consider it necessary to go through this evidence in detail. It certainly tended very strongly to show that he was at all times a Protestant, and that the statements as to his religious belief, deposed to by Mrs. Yelverton, either were never made by him, or, if made, were made for some object or purpose; and I certainly was under the impression that the evidence strongly preponderated against the validity of the alleged Irish marriage, and that the jury would have so found. I need not say that the Counsel for the respective parties, in their addresses to the jury, called their attention to the evidence in detail; the Counsel of the defendant calling on the jury to find the alleged Scotch marriage never in fact took place; and if it did, that the law of Scotland was as deposed to by Mr. Pattison, and therefore the alleged marriage contract invalid: and with respect to the marriage ceremony celebrated by the Rev. Mr. Mooney, that was invalid, the defendant being at the time a Protestant, to the knowledge of the lady and the priest. When charging the jury, I endeavoured to keep the questions as to the Scotch and Irish marriages distinct; I left to the jury, as a matter of fact, what the Scotch law on the subject was, directing as clearly as I could their attention to the difference of opinion which existed between the Advocates who had been examined in relation to the necessity of a witness being present, as also to the evidence given by them in relation to the effect of the refusal of the lady to permit sexual intercourse; on which latter point I do not think any substantial difference existed between them: and I left to the jury the question whether such occurrences as deposed to by Mrs. Yelverton, in fact took place in Edinburgh, and if so, whether same was a valid binding marriage according to the law of Scotland. And I further informed them that, if they found that a valid marriage according to the law of Scotland had been contracted between the parties, they need not consider the validity of the alleged Irish marriage; but that if, for any reason they found against the validity or existence of the alleged Scotch marriage, that in that case it was necessary to consider the validity of the Irish marriage celebrated by the Rev. Mr. Mooney; and that as no doubt existed but that, according to the evidence of the defendant himself, what occurred in the chapel of Kilowen, so far as ceremony was concerned, amounted to a valid marriage ceremony according

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YELVERTON. to the Common Law of the country, that the only question was, whether that marriage was null and void in consequence of Major Yelverton having been at the time or within twelve months before a Protestant, or having professed himself a Protestant within twelve months before the celebration of the marriage, I directed their attention to the provisions of the 19 G. 2, c. 13, and instructed them that, as it appeared that the defendant had been brought up and educated as a Protestant, the presumption of law was that he continued to be such; and that therefore, to find in favor of the validity of the Irish marriage, they should on the evidence be satisfied that the defendant had, more than twelve months before the 15th of August 1857, ceased to be a Protestant and became a Roman Catholic; and that he had not within these twelve months been or professed himself to be a Protestant: and further, that though they should on the evidence be satisfied that the defendant Major Yelverton had in reality and fact been a Roman Catholic during the twelve months preceding the 15th of August 1857, still that, if within that period he professed himself to be a Protestant, the alleged Irish marriage would be null and void. And I further informed them that the law of estoppel (as had been contended for by plaintiff's Counsel) did not apply to the case; and even if Major Yelverton had represented himself to the lady and the priest to have been a Roman Catholic at the time of the marriage, and for twelve months previously, still, if on the evidence they should be of opinion, notwithstanding such representations, that he had been a Protestant, or had professed himself as such within twelve months, they should find against the validity of the alleged Irish marriage, even though they should come to the conclusion that on the faith of such representations the lady was induced to agree to the marriage. Having thus stated what occurred to me in relation to the law of the case, I informed the jury that I should submit to them, and require their answers to, the following questions: first, was there a marriage, valid according to the law of Scotland, contracted between the parties in Edinburgh in the month of March 1857?—which of course involved two questions—was such a contract entered into as deposed to by Mrs. Yelverton? secondly, was it a binding marriage according to the law of Scotland? And I informed the jury that, in case

they found in favor of the Scotch marriage, they need not consider the validity of the Irish one: but in case they should find against the Scotch marriage, they should then consider whether a valid Irish marriage had been celebrated between the parties. And I further informed them that, if they found in favor of either of the alleged marriages, they should find the issues joined on the record in favor the plaintiff. Such being my directions to the jury, defendant's Counsel tendered five exceptions; the two first relating to the alleged Scotch marriage, and the third, fourth and fifth to the Irish one. The first exception is in substance that, as it appeared by the evidence of the lady that the alleged mutual acknowledgement of matrimonial consent was not made in the presence of a third person to witness same, the Judge should have informed the jury that such mutual acknowledgement did not constitute a valid marriage.

The second exception was in substance that, as Mrs. Yelverton stated that after such acknowledgement she considered herself his wife by the law of Scotland, but not in fact, as she had scruples of a religious nature against permitting him to exercise the rights of a husband until a further ceremony by a Roman Catholic priest should be celebrated, the Judge should direct the jury that such mutual acknowledgment did not constitute a valid marriage.

Now with respect to the first exception, it is not alleged that the evidence of Mr. Lancaster is not clear and distinct that, in his opinion, the law of Scotland does not require the presence of a witness to give validity to a matrimonial acknowledgement such as that deposed to by Mrs. Yelverton; and therefore the Judge was required to determine that the Scotch law on the subject was as deposed to by the defendant's Advocate Mr. Pattison, and not Mr. Lancaster. No authority has been cited for such a proposition. Of course, if the validity of a Scotch marriage arose in a Court of Equity, or a Matrimonial or Ecclesiastical Court, in which the Judge discharges the functions of both Judge and jury, it would be the duty of the presiding Judge or Court to decide between the conflicting evidence of the Advocates and other witnesses examined; and possibly in such a case the Judge or Court may be at liberty to consider not only the parol evidence given in the case, but also authorities, reports of decisions of the Scotch Courts, and other

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such books relating to the subject; but very high authority has doubted whether, even in such cases as I have supposed, the Judge or Court is not bound decide altogether on the evidence in the cause; but be this as it may, what the Scotch law is on any subject, being here a matter of fact and not of law, just as the law of France or any other foreign state, the jury, and not the Judge, must be the proper tribunal to decide the question. During the trial, I looked into, as carefully as I could, the cases referred to by the Advocates on both sides; I came to the conclusion that the point was one not quite free from doubt; but certainly the inclination of my opinion was and is that, if, notwithstanding the absence of a witness, the Court, which had to decide the question, came to the conclusion that a deliberate matrimonial engagement had been entered into between the parties, that the marriage would be upheld. On the whole, I entertain no doubt that the exception should be overruled.

With respect to the second exception, every observation I have made in relation to the first applies still stronger to the second. I adopted the evidence of both Advocates; I left the question to the jury, stating to them that the result of the evidence appeared to be, that the refusal to permit the defendant to enjoy the rights of a husband might be strong evidence that the lady did not consider the Scotch ceremony a complete, valid and binding marriage at the moment, without reference to something further to be done; and if so, they should find against the marriage: but that if the parties intended at the moment to contract the relation of husband and wife, the lady's refusal to permit the defendant to enjoy the rights of a husband, until a further religious ceremony was celebrated, did not, according to the evidence in the case, invalidate the previous marriage agreement. The question was I think properly left to the jury, and I am of opinion that the exception should be overruled.

Next in order is the third exception, which is the first in relation to the Irish marriage. It is to this effect:—the Counsel for the defendant called on the Judge to tell the jury that, to constitute a marriage celebrated by a Roman Catholic priest valid, it was necessary that both parties for twelve months previous to such marriage

should have uniformly, uninterruptedly and publicly professed the Roman Catholic religion ; and that as there was no evidence of such uniform, uninterrupted and public profession by the defendant Major Yelverton, that the Judge should have directed the jury that the marriage was void. It will at once occur to every one who reads this exception, that it is not in the usual form that there was no sufficient evidence of the defendant Major Yelverton having been a Roman Catholic at the time of the marriage, and for twelve months previously, and therefore that the Judge should have directed the jury that the marriage was null and void. If the exception were in that form it would at once have raised the question discussed in recent cases, whether, though there was some evidence of the defendant having been a Roman Catholic, there was a sufficiency of such evidence to be submitted to the jury, having regard to the evidence given by the defendant and his witnesses? To me it appears plain that no such question arises in the present case ; and indeed in the able argument of the learned Counsel who prepared this exception, he stated that such was not the meaning of the exception, or his intention in preparing it ; he being of opinion that if the fact of a person being a Roman Catholic or a Protestant depended on internal belief and conviction, and not on mere external profession, that there was ample evidence in the case of Major Yelverton having been a Roman Catholic, which could not have been withdrawn from the jury. And I confess I do not well see how it could be otherwise, so long as the rule of law exists that a man's own acts and declarations are at all events evidence against himself. In the first place there was the presumption that exists in favor of marriage ; and that if a party will go through a solemn religious ceremony with the apparent purpose of contracting the relation of husband and wife, that such was a legal and valid ceremony. On the Sunday before the marriage, the defendant Major Yelverton went to mass at Rostrevor, and took part in the ceremony, like any other Roman Catholic. According to the evidence of Mrs. Yelverton, when asked was he a Catholic by the priest, immediately before the ceremony, he said he was, but not a good one, and that he was no Protestant, and that he was free to marry ; that she had seen

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him at mass twice in Edinburgh; that when in Edinburgh he told her he was not a Protestant, and that he believed in the Catholic doctrines, though he did not practise it; and he also informed her that some of his family were Roman Catholics. As I have already stated, on cross-examination she stated that, when she met the defendant at Naples, long before the marriage, her impression was that he was a Roman Catholic, but that from the time he told her he was a Roman Catholic, she thoroughly believed that he was one; that she never told Mr. Mooney or anyone else, in confession or otherwise, that he was a Protestant; that on another occasion she asked him how he was baptised, he said he did not recollect, and that he had not been confirmed; and, on her stating if so she thought he was no Protestant unless he believed, he said I do not believe in it now, and never did: that she considered him a Roman Catholic, not because she saw him at mass, but because he told her so himself. No part of this evidence may have been true; but I am not aware that a Judge is justified in withholding evidence from the jury on any notion of his own that it is untrue. In addition to this evidence of Mrs. Yelverton, there is the evidence of the plaintiff Mr. Thelwall, that on one occasion the defendant told him he had a letter from his sister, saying she had heard he had become a Roman Catholic; and that she must have heard it from some one who had seen him at mass: not at all questioning the allegation that he had become one. On the whole therefore I concur in opinion with the defendant's very able Counsel, that the third exception cannot be sustained, unless the Judge should have stated the law on the subject to the jury, as required thereby.

This brings me to the consideration of the legal question involved on the exception, that for a man to be a Roman Catholic within the 19 G. 2, c. 13, he must for twelve months have uniformly, uninterruptedly and publicly professed the Roman Catholic religion. The Act is very short:—"Whereas the laws now in being, to prevent Popish priests from celebrating marriages between Protestant and Protestant, or Protestant and Papist, have hitherto been found ineffectual; for remedy whereof, be it enacted that every marriage that shall be celebrated, after the 1st of May

"1746, between a Papist and any person who hath been, or professed him or herself to be, a Protestant, at any time within twelve months before such marriage, or between two Protestants, if celebrated by a Popish priest, shall be, and is hereby declared, absolutely null and void, to all intents and purposes, without any process, judgment, or sentence of law whatsoever."

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The only words used in this Act are "Papist" and "Protestant." No clue given as to what constitutes the one or the other; nothing leading to the inference that to render the marriage valid both parties should have uniformly, uninterruptedly, and publicly professed the Roman Catholic religion. But then it has been argued that this Act, being one of a code, the meaning of the words "Papist" and "Protestant" is to be ascertained from other statutes on the same subject; and for that purpose several statutes have been referred to. An early one, though not bearing on the subject of marriage, I think shows what the Legislature considered constituted the difference between a Protestant and a Papist—namely, 7 W. 3, c. 5, "An Act for the better securing the Government, by disarming Papists." The first section enacts that all Papists shall, before the 1st of March then next, deliver up their arms to some Magistrate; Justices may search for arms; every person offending, liable to penalties. No definition given of Papist. Section 8—No gunsmith shall take any Popish apprentice, under penalty of £20; and every Mayor, Justice of the Peace, &c., is authorised to send for all apprentices whom they shall suspect of being Papists, and tender to them the oath and declaration against transubstantiation and invocation of saints; and the refusal to take same shall be conclusive evidence of the apprentice being a Papist, not only against himself, but also against the master engaging him;—a tolerably clear declaration that it was religious belief that was the regulating distinction. The 9 W. 3, c. 13, recites that Papist solicitors are common disturbers, enacts that no person shall act as solicitor without taking the oath and signing declaration, &c.

The first Act which has been referred to, prohibiting the marriage of Protestants with Papists, is the 9 W. 3, c. 3, which recites the great mischiefs which have arisen from Protestant women,

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possessed of property, being induced to marry Papists or Popish persons, enacts that if any Protestant maid or woman, possessed of certain property, shall marry any man without having obtained a certificate of his being a known Protestant, from the minister of his parish, bishop, and Justice, or from two of them, the person who shall so marry shall be incapable of enjoying her property, and same shall vest in Protestant next-of-kin, and she shall be incapable of being guardian, executor, &c.; and every Protestant minister and Popish priest, who shall marry such persons without such certificate, shall suffer a year's imprisonment and fine of £20.

Section 2—If any Protestant man shall marry a woman without such certificate, he shall be deemed a Popish recusant; unless, within a year, he shall procure his wife to be converted, and obtain certificate from the bishop or Chancellor.

Section 5—In all cases where a certificate is required by this Act, that the person marrying is a known Protestant, if any marriage shall take place without such certificate, and it can afterwards be made appear by proof that such person was a known Protestant, in such case they shall not be liable to any forfeitures or penalties under the Act. Nothing in this Act defines who are Papists and who are Protestants.

The 2nd of *Anne*, c. 6, renders it penal for Papists to send their children out of the country to be educated; children of Popish parents, being Protestant, are declared entitled to maintenance. No person of the Popish religion shall be guardian of any child under the age of twenty-one years.

Section 5—If any Protestant, having real estate or personal property within this kingdom, shall intermarry with any Papist, or person professing the Popish religion, either within this kingdom or without, such person, being thereof convicted, shall be liable to the penalties in the Act of *William*, as if such marriage had taken place within the kingdom.

Section 6—Every Papist incapable of purchase, except leases not exceeding thirty-one years, at a rent equal to 2s. 3d.; every other purchase void.

Section 7—No Papist shall take, by descent, any lands whereof

any Protestant is seised, unless he conform within six months; until conformity, same shall descend to Protestant next-of-kin.

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Section 9—The wife of such person, so disabled, being a Protestant, shall be entitled to her dower, as she would have been if this Act had not been made.

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Section 10—Lands whereof Papist is seised in fee or in tail to descend to his sons in gavelkind; unless eldest son conform, in which case same shall descend to him.

Section 15—No person shall take the benefit of this Act, as a Protestant, who does not take the oath and subscribe the adjuration following; &c.

There is not in this Act any definition of Protestant or Papist. The same words are used in the clause prohibiting the marriage of Protestant and Papist, as that rendering Papists tenants for life, and entitling Protestant widows to dower.

The 6 *Anne*, c. 16, is the Act preventing the taking away and marrying children, against the will of their parents and guardians:—

Section 6—If any Popish priest shall presume to celebrate the marriage of any of the persons aforesaid, or shall celebrate marriage between any persons, knowing at the time that they, or either of them, were of the Protestant religion, every such Popish priest so offending shall be deemed a Popish regular, and subject to the penalties thereof.

The 8 *Anne*, c. 3, s. 11—No convert from Popery is to be deemed a Protestant, unless he receive the sacrament, and take oath and sign declaration;—to which I have already referred.

Section 26—If any Popish priest shall be prosecuted for marrying any persons, knowing that they, or either of them, are of the Protestant religion, and it shall appear that one or both of such parties were Protestant at the time of the marriage, it shall be assumed that the priest so prosecuted knew that they were of the Protestant religion; unless the priest shall produce a certificate of the minister of the parish, certifying that the said persons were not of the Protestant religion.

Section 30—Bills for discovery of trusts for Papists; all issues on the Act to be tried by none but known Protestants.



T. T. 1862. The next Act, the 12 G. 1, c. 3, s. 1, enacts that if any  
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 or reputed Protestants, or between a Protestant or reputed Pro-

testant and a Papist, such Popish priest, or degraded clergyman,  
 or layman, shall be guilty of felony, and suffer death as a felon.

Section 2—Magistrates may summon persons suspected to be  
 married by such Popish priests, and examine them by whom  
 married, and in what form, and with what ceremonies, and what  
 religion the persons so married professed; and bind them over to  
 prosecute; &c.

These are the principal Acts which have been referred to, as  
 bearing on the subject, prior to the Act of the 19 G. 2, rendering  
 the marriage void.

There is also the 23 G. 2, c. 10, s. 3, which recites the Act of  
 12 G. 1, rendering it felony in a Popish priest to marry two  
 persons, where either or both of them are Protestant; and the  
 Act rendering such marriage null and void; since, where doubt  
 has arisen whether it is still a felony to celebrate such void mar-  
 riage, it is enacted that every Popish priest who shall celebrate  
 such marriage shall be guilty of felony, although the marriage be  
 declared null and void.

I cannot find, in any of those Acts, any definition of what is a  
 Protestant or a Papist; and finding that several of those Acts—for  
 instance, 2 of *Anne* and 8 of *Anne*—legislate, not only as to the  
 marriage, but also as to the property of Papists and Protestants,  
 using precisely the same description in the clauses relating to mar-  
 riage and to property, I cannot persuade myself that, according to  
 the true construction of these Acts, a person would be held to be a  
 Papist for the purpose of being disabled to hold property, and  
 would be considered a Protestant for the purpose of rendering void  
 his marriage, if celebrated by a Roman Catholic priest. I have,  
 with all the attention in my power, considered, not only the statutes  
 to which I have referred, but also any reported cases I have been  
 able to find on the subject; and I certainly have not been able to  
 find any such proposition decided.

The question then is, what is the true meaning of the word "Protestant" in the 19 G. 2, c. 13, which renders void every marriage celebrated by a Roman Catholic priest between a Papist and any person who hath been, or professed him or herself to be, a Protestant, at any time within twelve months before the celebration of such marriage?

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It appears to me to be clear, on the reading of the clause, that it distinguishes between being, and "professing him or herself to be a Protestant;" and accordingly, in some cases to which I shall hereafter have occasion to refer, it has been held that though a party may, in fact, be a Roman Catholic, and not a Protestant, yet he or she may have professed him or herself to be a Protestant, so as to invalidate the marriage celebrated by a Roman Catholic priest: and accordingly, so the Judge directed the jury in the present case. Assuming this to be so, and that being a Protestant is something different from merely professing to be so, what can it be but believing in its doctrines, which are essentially opposed to those of the Roman Catholic Church? And do not the Acts of Parliament to which I have referred clearly show that such was the meaning in which, in those Acts, the word "Protestant" is used? What stronger illustration of this can be adduced than the 7 W. 3, c. 5, to which I have already referred, which prohibited gunsmiths taking Papist apprentices, and makes the refusal of the apprentice to take the oath and sign the declaration of supremacy and abjuration conclusive evidence, both against the master and the apprentice, of the latter not being a Protestant, and being a Papist? But it occurs to me that it does not depend on abstract reasoning on the words of the Act themselves; but that, as far back as we are able to find any reported cases on these Acts, the Courts considered that internal belief constituted the distinction between Protestant and Papist. Such, I think, must have been the opinion of the Chancellor of 1759, who heard the case of *Swan v. The Governors of Stevens's Hospital* (a). The bill was filed by the plaintiff, as a Protestant discoverer, to be declared entitled to several estates, which one Edward Cusack had purchased at different times during his life,

(a) Howard's Popery Cases, 136.

T. T. 1862. and which, by his will, he devised to the defendants; for that he  
*Common Pleas* Cusack was a Papist when he made the purchases, and had died  
 THELWALL one. It was proved in the case, and not contradicted, that Cusack  
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 was also proved that he had, all his life, been punctual in his religious performances as a Protestant; but, on the other hand, it was also proved that he had done some acts which tended to show that he was inclined to Popery, and that he had died a Papist. The case was argued at some length; and a case of *Savage v. Diderici*, in the Court referred to, in which, though there was considerable conflicting evidence, the Court itself decided as to the religion of the party; yet the Court directed an issue, to inquire whether the said Edward Cusack was at any and what time a Papist, or person professing the Popish religion. There was an appeal to the House of Lords in England, Lord Hardwicke being the Chancellor, who reversed the order directing the issues; but, in his judgment, considers the case, first, on the nature of the claim and the proofs on each side; and the other, as Popery laws. As to the first, he seemed to doubt, if it rested there solely, whether he should have been for a reversal; for it must be admitted there was a contrariety of evidence, though the weight greatly preponderated in favor of his being a Protestant; what object could he have had to receive the sacrament, unless really a Protestant? that as to the facts which had been proved, tending to show that Cusack was in reality a Papist, if he were now alive he might have explained and given a satisfactory answer to them. Accordingly he advised the House of Lords to reverse the decree directing the issues, and to decide, on the evidence, that Cusack was in fact a Protestant. It appears, I think, clear that, in this case, what the Court was inquiring into was the religious belief of the party whose religion was inquired into.

In *Close v. Hamilton (a)*, a bill was entertained to perpetuate testimony, under these circumstances:—Sir Robert Maxwell, being seised of an estate for life, remainder to his wife for life, remainder to himself in fee, by voluntary conveyance assigned the reversion to

(a) Howard's Popery Cases, 30.

his brother Thomas Maxwell, who sold to a third person, who again sold to the defendants for £500. The plaintiff purchased the reversion from Sir Robert Maxwell's heir-at-law; and, ten years after the death of Sir Robert, Lady Maxwell, being still alive, brought this bill to perpetuate testimony of witnesses to prove that, though Sir Robert was born of Protestant parents, and was always deemed and reputed a Protestant, yet that he was in reality a Papist. Of course, all that was decided in this case was, that the bill would be entertained for the purpose of perpetuating the evidence; but it was assumed by all parties that, though a man was apparently a Protestant, he might be in reality a Papist: which could only be internal belief, though possibly evidenced by outward acts.

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There is a case of *Tisdal v. Lunn*, referred to in pp. 40, 41 and 42 of *Howard's Cases*, in which the question for decision was, whether a person who had been a Protestant had become a Papist, so as to render discoverable leasehold property which he acquired after his becoming a Papist. These cases I refer to for the purpose of showing that the question in them was, whether a Protestant had become a Papist. There is no such doctrine to be found in any them as stated by the third exception in the present case. It remains to be considered whether any such principles are laid down in any of the cases decided on the Marriage Act itself. The leading case on the subject is I believe *Kirwan v. Kirwan (a)*. In that case the question was, whether the marriage of Edward Kirwan, in 1811, with Celia Hopkins, by a Roman Catholic priest, was a valid marriage; plaintiff proved that his mother was a Roman Catholic; he was baptised by a Roman Catholic priest; that he was educated by Roman Catholics, some of whom were priests; that he had in his youth, and on several occasions afterwards, attended Roman Catholic places of worship, down to 1814; that he was reputed a Roman Catholic; that when he lived with Celia Hopkins he attended mass, when celebrated in his own house; that his children by Celia Hopkins were baptised by Roman Catholic priests, and brought up Roman Catholics: one witness swore he

(a) Batty, 712.

**T. T. 1862.** received the sacrament from the priest on the day of his marriage with Celia Hopkins. On the other side, for the defendant, the priest of the parish in which Edward Kirwan resided from 1798 to 1807, **THELWALL** *v.* **YELVERTON.** swore that he never attended mass when celebrated by him, and that he considered him to be a Protestant. It was also proved that he attended Protestant places of worship at different times in 1805, 1806, 1808, 1809 and 1810, and once in 1811. Another witness proved that he saw him often at Church in 1809 and 1810. Another saw him at church in October 1810 and July 1811. Several witnesses swore they considered him a Protestant, and that he was in the habit of advocating the Protestant, and abusing the Roman Catholic religion. It appeared that he died a Protestant, and directed his children by his second marriage with Miss Lambert to be brought up in the Protestant religion. It is quite clear that the evidence which I have stated left it a matter of some doubt what was in fact the religion of Edward Kirwan at and before the time of his marriage with Celia Hopkins. The Judge left the question to the jury, as one of fact, whether the said Edward Kirwan was a Protestant or a Roman Catholic; and whether, even though he was in fact a Roman Catholic, he had professed himself to be a Protestant within said period of twelve months? And he then directed the jury what would amount to a professing himself a Protestant within the statute. I do not find in this case any suggestion that, to constitute Edward Kirwan either a Roman Catholic or a Protestant, there must have been a uniform, uninterrupted and public profession of such religion. On the contrary, I think it appears clear that the learned Judge in that case must have thought, as any jury who heard his charge would, that the fact of Edward Kirwan's religion depended on his internal belief and conviction, though of course such internal belief and conviction should be ascertained from his outward acts and declarations, "such as advocating the one and abusing the other religion;" and that these outward acts and declarations being inconsistent and contradictory one of the other, the jury was the proper tribunal to say what conclusion was to be drawn from them, as to the actual religion

of Edward Kirwan. I am aware that in that case Edward Kirwan was educated and brought up a Roman Catholic, and the question was, had he become a Protestant. In this case the question is, whether the defendant who was brought up a Protestant has become a Roman Catholic; but I am not aware that either principle or authority requires that this circumstance should alter the mode of proof or the nature of the fact to be inquired into.

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The next case I shall refer to is *Brien v. Burke* (a). This was a case of nullity of marriage, promoted by Mary Anne Brien against Tobias Burke; the allegation being that, at the time of Burke's marriage with the plaintiff Miss Brien, he had a previous wife living; in answer to which Burke insisted that his marriage with the alleged first wife Miss Butler was void, he having been a Protestant at the time. In order to sustain the alleged marriage by the Roman Catholic priest, evidence was given of the defendant Burke having attended mass from time to time as a Roman Catholic, and various circumstances relied on, amongst others the fact of having been married by a Roman Catholic priest. On the other side, evidence was given that though the greater number of his family were Catholic, that his elder brother was a Protestant clergyman, and that the defendant had been brought up by him, as the witness proved, a Protestant; that he from time to time attended St. Patrick's and Christ Church, in the city of Dublin; and one witness stated he wanted to convert him from being a Roman Catholic. The learned Judge decided, and no doubt rightly, that the evidence preponderated as to his being a Roman Catholic; but no one who reads that case can doubt but that he considered what he was inquiring into was the religious belief of the party, precisely as the Judge left the case to the jury in *Kirwan v. Kirwan*; in neither case is there any suggestion of the law being as laid down in the third exception.

I observe that, in *O'Connor v. M'Cann* (b), Dr. Radcliffe refers to *Kirwan v. Kirwan*, as if in that case something was decided as to Edward Kirwan having been a legal Roman Catholic; and that the case turned on whether, assuming him to be a Roman

(a) 2 Adams, 471.

(b) Mill. Rep. 204.

T. T. 1862. Catholic, he had within twelve months professed himself to be a Protestant. With great deference, I do not think that is so. It was not, that I see, controverted in that case that Edward Kirwan, who was illegitimate, the child of a papist mother, was baptised, educated and brought up a Roman Catholic. Still the question was in fact left to the jury, as to whether he was a Roman Catholic or Protestant at the time of the marriage: and though the other question was also left to them, as to, even if he were a Roman Catholic, whether he professed himself to be a Protestant; still it is impossible to know on what ground the jury proceeded; they may have considered him in fact a Protestant: and if they were obliged to hold that he was in fact a legal Roman Catholic, they might not have come to the conclusion that, being a Roman Catholic, he professed himself to be a Protestant.

The report in *Batty* appears clearly to have been taken from the bill of exceptions, which shows what the charge of the Judge was.

In the *Nisi Prius* cases of *The Queen v. Orgill* and *The King v. Hanley*, reported in *Carrington & Payne*, p. 81, in the *note*, if accurately reported, Baron Alderson considered the statement of the person, at the time of his marriage that he was a Roman Catholic, conclusive evidence against him that he was so, in a trial for bigamy. And though Chief Baron O'Grady did not consider the statement of the person conclusive, he left it to the jury, who acted on it, and convicted him.

On the whole therefore I am of opinion that the actual religion of the defendant, whether Roman Catholic or Protestant, was a question of fact for the jury; that though the evidence of his being in fact a Protestant very much preponderated, still that there was evidence which should have been submitted to the jury: and that to render him a Roman Catholic, there is neither principle or authority that he should have uniformly, uninterruptedly and publicly professed himself a Roman Catholic, as stated in the third exception. Let me suppose that a Protestant, wishing to become a Roman Catholic, but fearing to disoblige or annoy his family, is privately received into the Roman Catholic Church, no one being aware of it but himself and the priest, and that he for twelve or

eighteen months privately attends to all religious duties as a Roman Catholic; and that he refrains from attending Church or any other religious ceremony of the Protestant Church, so that in fact his being a Roman Catholic is known only to his priest and his intended wife; and he is then married by the Roman Catholic priest:—if the law in the third exception is well founded, such a marriage would be void, though no one could I believe doubt that he was in fact a Roman Catholic, and that he had not within twelve months professed himself to be a Protestant. On the whole, in my opinion, the third exception should be overruled.

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The fourth exception is, that Counsel for the defendant called on the Judge to tell the jury, that if they believed that, within twelve months previous to the Irish marriage, the defendant attended Divine worship in the Protestant churches in Scotland and Ireland, and that he did so as a professing Protestant, that the Irish marriage was void. The first objection to this exception is, that it is not on the ground of any alleged misdirection, but for non-direction; which, according to the decision of the House of Lords, in the case of *Anderson v. Fitzgerald*, is not the subject of exceptions. It appears from the bill of exceptions, that the Judge informed the jury that, though they should, on the evidence, be satisfied that, for the twelve months previous to the Irish marriage, the defendant Major Yelverton had in reality and fact been a Roman Catholic, still that if, within that period, he professed himself to be a Protestant, the Irish marriage would be null and void; and he referred the jury to the evidence, relied on by the defendant, of his having attended Divine worship in the Protestant church during those twelve months; and informed them that the profession of Protestantism was the doing of any unequivocal religious act inconsistent with the party being a Roman Catholic. I am not aware that in so directing the jury, there is any misdirection. It occurs to me that it was altogether for the jury to determine the character of the act, and whether it was inconsistent with the party doing it being a Roman Catholic. I certainly intended to state the law on the subject, as it was stated by the Judge who



T. T. 1862. tried the case of *Kirwan v. Kirwan*. I am quite aware that, on a  
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 YELVERTON. there is no actual misdirection, still that the charge of the Judge,  
 from being ambiguous or not sufficiently pointed, may have had  
 the effect of misleading the jury. And it is quite right that this  
 should be so on a new trial motion; because, in such a case, the  
 Court has before it the whole of the evidence, and they are enabled  
 to see whether it is probable the jury has been misled by the alleged  
 ambiguity or omission of the charge. But this reasoning does not  
 at all apply to a bill of exceptions; in which, if well founded, the  
 exceptions should be allowed, without any reference to the finding of  
 the jury. I therefore am of opinion that the fourth exception  
 should be overruled.

The fifth and last exception was, that the Judge told the jury that  
 the profession of Protestantism was the doing of any unequivocal  
 religious act inconsistent with his being a Roman Catholic; whereas  
 he should have told them that, if the party whose religion was  
 inquired into held himself out, by word or act, to others as a  
 Protestant, within twelve months, he was a professing Protestant,  
 within the Act.

Now, the first answer to this exception is, that there was no  
 evidence of any profession of Protestantism, within the twelve  
 months, by the defendant, except attending church. There was  
 nothing to raise the question what other acts or declarations would  
 constitute a profession of Protestantism. And I am not aware  
 that a Judge at a trial is obliged, at the instance of either party,  
 to lay down general legal propositions not necessary for the facts  
 of the particular case. But, even if the facts of the case required  
 the consideration of such a question, the case of *O'Connor v.*  
*M'Cann* (a), decided by Dr. Radcliffe, is an express authority.  
 In that case the question was the validity of the marriage of Mar-  
 garet Forbes with Ross M'Cann. They were married by a Roman  
 Catholic priest, in the month of June 1791. M'Cann was admit-  
 tedly a Roman Catholic. It appeared that Margaret Forbes had

(a) Mil. Rep. 204.

been originally a Roman Catholic; but there was some slight evidence that, on the occasion of her marriage with the Rev. Mr. Forbes, a clergyman of the Established Church, she had read a form of recantation, and become a Protestant. But still it appeared that she at all times attended the Roman Catholic service. After the death of her husband Mr. Forbes, on the 13th of March 1790, she made an affidavit that she was a Protestant; and, founded on the affidavit, applied by petition to the Chancellor to be appointed guardian of her children, which she could not be if it was known that she was a Roman Catholic. The Master in Chancery and Chancellor, acting on this statement, appointed her guardian of her children, by letter of guardianship, dated 17th July 1790. Dr. Radcliffe did not consider her affidavit a profession of Protestantism, within the Act; and he considered that the rule laid down in *Kirwan v. Kirwan* was the correct one, that a profession of Protestantism, within the Act, must be some public and unequivocal act of a devotional nature, showing an adherence to the Protestant faith. On these grounds, I am of opinion that the fifth exception should also be overruled.

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Hitherto I have considered the rulings merely on the exceptions, which interest only the parties in this particular case; but a question which, in my opinion, is of much greater consequence, may arise, and that is this:—if it should be held that any one or more of the exceptions in relation to the Irish marriage should be well founded, but that all relating to the Scotch marriage should be overruled, should the Court award a *venire de novo*? It is said the Court must do so; and that they cannot at all take notice of, or act on, the findings of the jury on the questions submitted to them at the trial in relation to the validity of the Scotch marriage. It is not questioned, I believe, that the Judge was right in submitting these questions to the jury, and requiring their answers; and it is not questioned, that if this case came before this Court, the Court of Error and the House of Lords, on a motion for a new trial on the grounds relied on by the exceptions in this case, that the Court would be at liberty, and bound, to have regard to the finding of the jury as to the validity of the Scotch marriage; and that, though

T. T. 1862. the objections in relation to the Irish marriage were well founded,  
*Common Pleas* there should be no new trial if the finding in relation to the Scotch  
THELWALL marriage was unobjectionable. But then it is said that this case,  
v. coming before this Court on bill of exceptions, that these collateral  
YELVERTON. findings, as they are called, should not be at all on the record ; and  
that, though they are there, the Court is bound to give judgment in  
the case as if it was uncertain whether the jury may not have been  
of opinion that the Irish marriage was the only one proved ; or, as  
it was put in the argument, that the jury may not have been una-  
nims in favor of either marriage, but half the jury may have  
thought the parties married in Scotland, the other half in Ireland.  
This may be decided to be law ; but it is so contrary to common  
sense, that I, for one, shall never be disposed to think it law until it  
is so decided by the Court of ultimate Appeal. But it is said the  
case is concluded by authority ; and *Davies v. Lowndes* (a) has  
been referred to. That was a writ of right, tried at the bar of the  
Court of Common Pleas. Two questions arose at the trial—first,  
had the plaintiff established her alleged pedigree ? and, secondly,  
even if she had, was a fine, levied by the tenant's father, levied  
under such circumstances as rendered it a bar to the demandant's  
title ? Exceptions were taken as to the admissibility and rejection of  
certain evidence by the demandant. The Chief Justice, in charging  
the jury, directed their attention to the two questions which arose  
in the case ; and that, if they found either against the demandant,  
to find a verdict on the mere weight for the tenant. But the jury  
were not required to answer these inquiries ; they were directed to  
find their verdict for demandant or tenant. The jury, on their  
return to Court, stated that, in their opinion, the demandant had  
failed to make out his pedigree, and that the fine was valid and  
binding. The Chief Justice asked whether they found for the  
tenant. They said they did ; and a general verdict was entered  
for the tenant. The bill of exceptions was made up by the Court,  
without noticing the opinion expressed by the jury as to the plain-  
tiff's pedigree and the fine ; and the question before the Court was,  
whether this communication, so made by the jury, should be stated

(a) 1 M. &amp; G. 473.

in the bill of exceptions : and the Court decided that it should not. The difference between that case and the case now before us is, that was an issue on the *mise*, a writ of right, in which the jury cannot find any special verdict, but must decide on the mere right ; but, secondly, in that case, no such questions were left to the jury : while, in the present case, in the presence of the parties, and without objection from either, the jury was informed by the Judge that he should require their answers to the questions submitted to them. In the present case, the question is not whether, the record having been made up without these findings, they should be introduced ; but whether, being on the record, the Court should ignore their existence, and dispose of the case as if they were not there ; more especially as, being on the record, should any effect be given to them to which they are not entitled, of course the matter can be set right in the Court of Error or House of Lords. It was said, during the argument, that no precedent was to be found of any such collateral findings being stated on the record, and that great inconvenience would arise if every idle communication between the Judge and the jury were to be inserted on the record. I quite agree, it might be attended with inconvenience, if the Court were bound to insert on the record communications which the jury were not called on or required to make ; but I confess I do not see that it would be attended either with inconvenience or injustice to insert on the record findings of the jury, which a Judge, in his discretion, without any objection from the parties, requires them to make, and the existence of which must necessarily be in furtherance of the justice of the case.

As to there being no instance of any such facts being stated in the record, I think that is a mistake. It appears to have been done in *Doe d. Lessee Knight v. Nepean* (a). That was an ejectment on the title, brought by the plaintiff on the 18th of January 1834, for recovery of certain copyhold premises, plaintiff's title being in remainder after the death of Matthew Knight. It appeared that George Knight had purchased the life interest of Matthew Knight from his assignees in bankruptcy, and the defendant was in posses-

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(a) 2 M. & W. 894.

T. T. 1862. sion under a conveyance executed by George Knight. At the trial  
*Common Pleas* of the case before Pattison, J., it appeared that Matthew Knight,  
 THELWALL the bankrupt, tenant for life, in the early part of 1807, went to  
 v. America; that a letter had been received from him in May 1807,  
 YELVERTON. but that he had not since been heard of. At the trial it was  
 insisted by the defendant that plaintiff's ejectment was barred by  
 the Statute of Limitations, as it did not appear that Matthew  
 Knight, the tenant for life, had been alive within twenty years  
 before the bringing of the ejectment, to which plaintiff answered  
 that he should be presumed to have been alive for seven years  
 after he had been heard of in May 1807, *i. e.*, May 1814, and  
 the ejectment being brought in January 1834, was within the  
 twenty years: and plaintiff further insisted that the Statute of  
 Limitations did not commence to run, so long as it was not known  
 that Matthew Knight was dead; as while it was uncertain whether  
 he was alive or not, the possession of the defendant claiming his  
 estate was not adverse.

The Judge at the trial stated his opinion that the plaintiff was  
 bound to prove Matthew Knight alive within twenty years, and  
 had not done so. And on the second point, as to the adverse  
 possession, he informed them that if Sir George Nepean took  
 as purchaser of George Knight, his possession was not adverse.  
 The plaintiff excepted to the direction on the first point; the  
 defendant excepted to the direction on the second point. The  
 jury found, not a general verdict for plaintiff or defendant, which  
 was the only issue joined on the record, but "that Matthew Knight  
 "was not proved to be alive within twenty years; but that it did  
 "not appear that there had been an adverse possession of twenty  
 "years against the plaintiff:" and a verdict was entered for the  
 plaintiff. The case was argued in the Court of Error, presided  
 over by Lord Denman. The record containing, as I read the  
 report, the finding of the jury. In page 911, Lord Denman says:—  
 "The jury found that it was not proved that Matthew Knight was  
 "alive within twenty years, but that it did not appear that there  
 "was an adverse possession of twenty years; and that therefore  
 "a verdict was found for the plaintiff." He then proceeds to

consider the defendant's exception as to the possession being adverse, and on grounds which it is not necessary further to refer to. He relies that the defendant's exception was well founded; and of course, if nothing but a general verdict had been found for the plaintiff, it would follow that defendant's exception being allowed, a *venire de novo* should issue: but instead of doing so, Lord Denman says:—"Still it is necessary to determine the first and principal point in the case, because if the learned Judge's direction was also wrong as to that, the lessor of the plaintiff would be entitled to retain the verdict, although he obtained on it on another ground." He then proceeds to consider the point, and concludes:—"For these reasons we are of opinion that the Judge's direction, in respect of what plaintiff complains, was correct, and that the verdict ought to have been found for the defendant; but as we cannot order it to be so entered, the result is, the verdict found for the plaintiff must be set aside;" having previously stated that if, on the other hand, the plaintiff's exception had been allowed, his verdict would be upheld, although the defendant's exception had been allowed. This, I confess, appears to me much more conformable with common sense, and I hope, common law, than the antiquated doctrine contended for by the defendant's Counsel. To show that the practice of entering on the record, in cases of bills of exceptions, the answers in findings of the jury to questions left to them by the Judge, and to which he requires an answer, I may refer to the very recent case of *The Mersey Dock Board v. Penhalloo (a)*, in the last number of the *English Jurist*, published on the 7th of June, in which the bill of exceptions is given in words from which it appears that when the jury found for the plaintiff, the jury were asked by the Lord Chief Baron "Do you find that the loss was occasioned by a bank of mud in the dock?" to which they answered "We do." "Do you find that the defendants, by their servants, had the means of knowing the state of the dock, and were negligently ignorant of it, if they were ignorant of it?" The jury answered "We do." And then the bill of exceptions concludes in the usual form; and is sealed by the Chief Baron.

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(a) Since reported, 7 H. & N. 329.

T. T. 1862. *Common Pleas* Those cases show that the course adopted by the Judge, in furtherance of the justice of the case, is not so monstrous and unusual as has been alleged. I can only say, should it be necessary to decide the question, I should be of opinion that the Court would be bound to give judgment according to the right of the case; and if it appeared that the jury properly found in favor of the Scotch marriage, that no miscarriage in relation to the Irish one should vitiate their verdict.

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COPE v. MOONEY.

*April 30.*

Notice to quit had been served on the defendant, in an ejectment, signed by A B, described therein as testamentary guardian of the infant plaintiff. To prove that A B was such guardian, probate of the will under which A B was appointed, and a notice which had been served (in accordance with the provisions of the 68th section of the 20 & 21 Vic., c. 79), were tendered in evidence.

THIS was an ejectment on the title, brought to recover possession of premises situate in Fownes-street, in the city of Dublin. The plaintiff Francis Robert Cope was described as an infant, under twenty-one years of age, by Cecilia Philippa Cope widow, his mother and next friend, and Sir Thomas Staples, Bart. Defence was taken, for all the premises, by Laurence Mooney, described as administrator with the will annexed of Michael Henry Connolly deceased, in the form prescribed by the statute. The action was tried before MONAHAN, C. J., during the Sittings after Hilary Term 1863. It was proved by the attorney for the plaintiff that the said Connolly deceased had been in possession of the premises, as tenant from year to year of one Arthur Cope, who died in the year 1843, leaving Robert Wright Cope Cope him surviving, who died in April 1858, leaving the plaintiff Francis Robert Cope his only son and heir-at-law, and the plaintiff Cecilia Philippa Cope his widow, and mother of the minor; that £40 a-year

*Held*, that the probate of the will was not receivable in evidence, to prove the appointment of testamentary guardians; such appointment not being a devise or other testamentary disposition of, or affecting, real estate, within the 68th section of the 20 & 21 Vic., c. 79.

*Held also*, that a notice, under the above section, need not state the purpose for which the evidence is required.

rent for the premises had been received from the said Connolly, commencing 1st November 1855, for said Robert Wright Cope Cope, and, since his death, for the minor plaintiff Francis Robert Cope. He further proved that he received rent from the occupying tenant and from the defendant; and that, on the 19th January 1863, he wrote to the defendant, demanding rent for the plaintiff up to November 1862, who replied, referring him to his clerk, who would pay him. Both letters were given in evidence; and it was proved that said clerk called at the office of the said attorney, and asked time, and promised to pay. The plaintiffs next sought to give in evidence the will of said Arthur Cope, dated 7th August 1840, but the learned Judge refused to receive it in evidence. The plaintiffs then proved service of a notice, on the 26th January 1863, on the defendant's attorney, to the effect that they would give in evidence, at the trial, the probate or an attested copy of the will of Robert W. C. Cope; and the probate was then tendered in evidence, but was objected to, on the ground that said notice did not specify the particular devise which the probate was intended to prove; and that the notice was not in conformity with the statute 20 & 21 *Vic.*, c. 79, s. 68; and that, to prove the appointment of testamentary guardians, a will must be proved *per testes*. The said will bore date 22nd June 1854, and appointed Cecilia Philippa Cope, the Earl of Gosford, and Francis M. S. Taylor, guardians of said Francis Robert Cope. It was proved that Taylor was dead, and that the Earl of Gosford had not acted in relation to the premises in question. A notice to quit, on behalf of the said Francis Robert Cope, was then proved, signed "Cecilia P. Cope, testamentary guardian of said Francis Robert Cope, on behalf of said "Francis R. Cope."

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The plaintiff's case having closed, Counsel for the defendant called for a nonsuit, on the following grounds:—first, because there was no legal evidence of the appointment of Cecilia P. Cope as testamentary guardian; secondly, because the notice to quit was signed by one only of two testamentary guardians; thirdly, because both testamentary guardians were not plaintiffs in the action.

The plaintiff's Counsel insisted that his Lordship should direct



E. T. 1863. the jury that, if they believed the evidence, they should find for them ; or that he should leave a question to the jury whether said  
*Common Pleas*  
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 MOONEY. Cecilia Philippa Cope, as guardian, acting with the sanction of her co-guardians, and also as natural or elected guardian, and in receipt of the rent, had authority to determine the tenancy. His Lordship declined to do so, and nonsuited the plaintiff, but reserved liberty to move to set aside the nonsuit, and have a verdict entered for the plaintiff.

A conditional order having been obtained—

*John O'Hagan* and *Patrick Martin*, now showed cause.

To prove the determination of the tenancy, it is necessary for the plaintiff to show that C. P. Cope had authority to serve the notice to quit. As natural guardian and mother of the minor, she could not do so ; and it has been already so held by the Court of Queen's Bench, in *Lessee Reade v. Kennedy* (a). Therefore to sustain that she was so entitled as testamentary guardian, the plaintiff having the burden of proof on him of the original will of Robert Wright Cope, sought to rely upon the probate copy as evidence of Mrs. Cope's authority. Probate was inadmissible—first, because no notice, in accordance with the statute, was given ; secondly, because, even if the notice had been valid, the statute does not apply, and the probate was not receivable in evidence to prove such appointment. The form of the notice does not comply with the directions of the statute, or even state the probate would be used instead of the original will. *Irwin v. Callwell* (b) may be cited in opposition ; but the form of the notice is not given in the report, and the language of Lefroy, C. J., is in favor of this view. The original will is the only legal proof of the appointment of testamentary guardians. Prior to the 1 & 2 Vic. there were three distinct kinds of testamentary dispositions,—first, that of real estate ; secondly, that of personal estate ; thirdly, that appointing a guardian. The 14 & 15 Car. 2, c. 19, s. 6 (*Ir.*), enabled a father, by will, executed in the presence of two witnesses, to dispose of the custody and tuition of his children. This section has not been

(a) 12 Ir. Law Rep. 565.

(b) 12 Ir. Com. Law Rep. 144.

repealed by the 1 *Vic.*, c. 26, subject only to the provisions of that statute. The 1st section enacts that the word "will" shall extend to a disposal of the custody and tuition of any child, by virtue of the Act of *Car.* 2. This appointment does not necessarily affect real estate. If the minor have real estate, it may draw to it the custody of that real estate, but it does not do so necessarily. In this case the infant was entitled to this property, not as heir-at-law, but under his grandfather's will. If plaintiff here says otherwise, he cannot maintain this action alone; and the mother and other testamentary guardians, in whom the estate was vested, should have been joined as plaintiffs.

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They cited *King v. Oakley* (a); *Hargrave's note to Co. Lit.*, p. 88 (b); *Shaw v. Shaw* (b); *Shopland v. Ryoler* (c); *Bedell v. Constable* (d); *Osborn v. Carden* (a); *Wade v. Baker* (f); *King v. Sutton* (g); *Right d. Fisher v. Cuthell* (h); *Doe d. Aslin v. Summersett* (i); *Doe d. Kindersley v. Hughes* (k); *Goodtitle d. King v. Woodward* (l); and also the observations on *Roe v. Hodgson* (m), in the 4th vol. of *Bythewood*, 3rd ed., p. 227, and 1 *Morden's Lectures*, p. 459.

*Battersby* and *J. F. Walker*, contra.

When there are several testamentary guardians named, each has a distinct and separate authority. In the present case, the mother alone acted as guardian in reference to the premises the subject-matter of the action; and, in addition to being testamentary guardian, she was natural guardian, or guardian *in socage*. The case in *East—Right v. Cuthell*—is no authority for defendant; for that was a case of executors and trustees acting under a power which, in terms, required a joint act.

In the case of joint tenants, a notice to quit by one is sufficient,

(a) 10 *East*, 491.(c) *Cro. Jac.* 55.(e) *Plow.* 293.(g) 3 *Ad. & Ell.* 59.(i) 1 *B. & Ad.* 135.(l) 3 *B. & Ald.* 689.(b) *Ver. & Scri.* 607.(d) *Vaugh.* 179.(f) 1 *Ld. Ray.* 130.(h) 5 *East*, 491.(k) 7 *M. & W.* 139.(m) 2 *Wilson.* 129.

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**MOONEY.** the principle being, that the tenant has the option of treating the tenancy determined by a notice to quit by one alone; and in like manner, in the case of executors, one of two or three may serve a notice to quit, and thereby determine a tenancy. Each testamentary guardian has a separate authority, as in the case of churchwardens.

The infant or his testamentary guardian have each a right to serve a notice to quit or maintain an ejectment; the former at Common Law, the latter by statute.

A demise in the name of the guardian, *qua* guardian, is unnecessary; for the guardian takes no estate in the lands, but a mere interest *ex provisione legis*, which is not assignable. The case of *Bedel v. Constable* defines the nature of that interest; in fact it is mere personal trust, and, in the language of that case, "the lands follow as an incident given by the law to attend the custody, not as an interest *devised* or *demised*." Thus the appointment may affect real estate, within the words and spirit of the 68th section of the Probate Act.

In reference to the technical point as to the form of the notice, as requiring a specification of the purpose for which the notice was to be used, *Irwin v. Callwell* (a) is conclusive; the identical objection being there made, and overruled.

The appointment of a testamentary guardian is within the spirit of the section of the Probate Act (68th section), being a testamentary disposition, affecting real estate. The Wills Act included, in the enumeration of the subjects intended to be comprised under the word "will," the appointment of a testamentary guardian under the statute of *Car.*, and was to be read *in pari materia* with the Probate Act, and as one code, and extending the word "will" to every testamentary disposition affecting real estate.

They also referred to *Cole on Ejectment*, p. 584; 14 & 15 *Car.* 2, c. 19, s. 7; 2 *Starkie on Evidence*, 3rd ed., p. 410; *Littleton*, s. 123; *Rex v. Sutton* (b); *Osborn v. Carden* (c); *Eyre v. Countess of Shaftesbury* (d); *Storke v. Storke* (e); *Doe d. Stace*

(a) 12 Ir. Com. Law Rep. 144.

(b) 3 A. & E. 597.

(c) Flow. 293.

(d) 2 P. Wms. 106, 120.

(e) 3 P. Wms. 50.

*v. Wheeler* (a); *Bacon's Abr.*, tit. *Executor*, b. 12; *Herbert v. E. T.* 1863.  
*Pigott* (b); *Nation v. Tozer* (c); *Doe d. Aslin v. Somerset* (d); *Common Pleas*  
*Alford v. Vickery* (e); *Doe d. Kindersley v. Hughes* (f); *Sligo* COPE  
*v. Davitt* (g); *Doe d. Mann v. Walters* (h); *M'Creight v.* v.  
*M'Creight* (i); *Doe d. Thomas v. Roberts* (k). MOONEY.

*Cur. ad. vult.*

MONAHAN, C. J.

This was an ejectment on the title, tried before me at the Sit-  
 tings after last Term. The defendant Mr. Mooney was the personal  
 representative of Michael H. Connolly. The plaintiff was Francis  
 Robert Cope, an infant under the age of twenty-one years, suing by  
 his mother and next friend. The action was brought to recover  
 possession of premises in Dublin. It was proved that the late  
 tenant Michael Connolly had held the premises for a number of  
 years, and that he had continued in possession up to his death, as  
 tenant from year to year. It appeared that he had come in under  
 the plaintiff's grandfather, after whose death he paid rent to the  
 plaintiff's father, and after his death to Cecilia Cope, the mother of  
 the minor Francis Robert Cope. A tenancy from year to year  
 having been thus established, the plaintiff next proved service of a  
 notice to quit, signed by Cecilia Philippa Cope, as the testamentary  
 guardian of the infant Francis Robert Cope, and requiring posses-  
 sion to be given up to her, on behalf of the infant, on the 1st of  
 November then next, or whatever other period thereafter the  
 tenancy commenced. This was done with a view of showing  
 that the tenancy from year to year had been determined. Counsel  
 then went into evidence, to show the authority of this lady to serve  
 the notice to quit. The tenancy, as I have stated, commenced long  
 before the accruing of the infant's title, namely, in the time of his  
 grandfather. The question then was, as to the authority of his

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(a) 15 M. & W. 623.

(b) 2 Cr. & M. 384.

(c) 1 Cr., M. & R. 174.

(d) 1 B. & Ad. 135.

(e) Car. & M. 280.

(f) 7 M. & W. 139.

(g) 3 Ir. Law Rep. 146.

(h) 10 B. & C. 628.

(i) 13 Ir. Eq. Rep. 323.

(k) 6 M. & W. 778.

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mother to serve a notice to quit, for the purpose of determining the tenancy. In that notice she described herself as the testamentary guardian; and to show that she filled that character, plaintiff's Counsel first produced the original will of the father of the minor, by which he appointed this lady and two others, one of whom is since dead, guardians of his infant son. But an objection was taken to the admissibility of this evidence, in consequence of the non-production of the attesting witnesses, or of any one acquainted with their handwriting. The will was accordingly withdrawn. Plaintiff's Counsel next tendered in evidence, for the same purpose, the probate of the will, and the notice which they had served [of their intention to give the probate in evidence; which did not however state for what purpose it was intended to give it in evidence. Defendant's Counsel objected to the admissibility of the probate in evidence—first, on the ground that the notice to give it in evidence was not sufficient, and, even it were, that the probate was not receivable in evidence to prove the appointment of testamentary guardians; and further, that, even if the probate was properly receivable in evidence, and that it proved the appointment of testamentary guardians, that the legal estate in the premises was in the guardians, and that the infant could not, as plaintiff, maintain an ejectment; and, lastly, that even if the plaintiff had such an estate as enabled him to maintain an ejectment, still that one of two testamentary guardians had not authority to serve a notice to quit, to determine existing tenancies. I stated that my opinion was in favor of the defendant on one or more of the objections so made; when Mr. *Battersby*, Counsel for the plaintiff, suggested that the mother, as natural guardian of the infant plaintiff, had authority to serve a notice to quit, or that her authority to do so was a question for the jury. I did not think so, and nonsuited the plaintiff; reserving liberty for him, with the consent of the defendant, to have the nonsuit set aside, and a verdict entered for the plaintiff, if I should have overruled all objections so taken by the defendant's Counsel.

The Court having granted a conditional order, in pursuance of the leave so reserved to enter a verdict for the plaintiff, the case has

been very fully argued before us, on showing cause against the conditional order. The two first questions which arise in the case are, first, whether the notice of the plaintiff's intention to give the probate of the will in evidence is sufficient, under the 68th section of the 20 & 21 Vic., c. 79. At the trial my impression certainly was, that it was not, and that the notice, to be valid, should have stated the particular devise or testamentary disposition which was to be proved by the production of the probate. We have, however, been referred to the case of *Irwin v. Callwell*, decided by the Court of Queen's Bench, and reported since the trial of the present case, in which that Court decided that a notice such as the present, was sufficient; that being so, we, sitting in this Court, have no power to overrule that decision. It must be reversed, if at all, by the Court of Error. It is therefore unnecessary for us to express any opinion as to the propriety of that decision, more especially as our opinion is in the defendant's favor on the next point which arises in the case, namely, that under the section of the Act referred to, the probate of the will is not receivable in evidence to prove the appointment of testamentary guardians; but that, for that purpose, the original will must be given in evidence, as before the passing of that Act. The 68th section of the Act provides that, when it is necessary to produce and prove an original will, in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party to serve notice that he intends at the trial, &c., to give in evidence the probate of the said will, &c., &c., and same shall be sufficient evidence of such will and its validity and contents, &c., &c. The question is, whether a will appointing guardians to the infant son of the testator, is a devise or other testamentary disposition of or affecting real estate? We do not think it is. If an action be brought by a testamentary guardian against a third person for taking away or detaining the ward, it does not occur to us that the Act in question would apply to the case; and that the original will should be produced and proved, though it should appear that the infant was entitled to real estate; or that a different rule should apply when it so happened that the infant was entitled to real estate, from that

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which would apply if he was entitled only to personal property, or had no property at all. It is quite true that a testamentary guardian has a certain estate or interest, or authority, over the real estate of the ward, whether that real estate has come to the infant from his father the testator, or any third person. But though this is so, we cannot hold that the will of a father, appointing a guardian to his son, is a devise or testamentary disposition of or affecting the real estate of the father, which descends to his son as heir-at-law: much less is it a devise or testamentary disposition of or affecting the other real estate, which the infant may be otherwise entitled to. We think that the section in question applies only to cases where the will immediately disposes of or affects real estate, as by charging same in execution of a power or otherwise.

We therefore are of opinion that the probate, of the will of the infant's father was not properly receivable in evidence to prove that plaintiff's mother was one of his testamentary guardians.

We having come to this conclusion, it is of course unnecessary to express any opinion on the questions which were argued at such length, namely, whether an infant can maintain an ejectment, there being testamentary guardians; or whether one of two testamentary guardians can determine a tenancy from year to year, by service of a notice to quit.

With respect to the point suggested at the trial, that the mother, as natural guardian, had authority to determine tenancies by service of notice to quit—there is no authority for any such position, and the case of *Lessee Reade v. Kennedy* (a) is an express decision the other way.

Lastly, Mr. *Battersby* argued that the mother was guardian in *socage* of the infant, and as such, had power to determine tenancies from year to year. In answer to this, it is enough to say no such suggestion was made at the trial. There was no inquiry as to the nature of the infant's property, in order to ascertain whether his mother could be guardian in *socage*; nor was there any inquiry as to the age of the infant, which would have

(a) 12 Ir. Com. Law Rep. 565.

been necessary, as it is well known the guardianship in *socage* determines when the infant attains the age of fourteen.

On the whole therefore our rule will be, to allow the cause shown against the conditional order; and the nonsuit directed by me at the trial will stand.

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THIS was an ejectment on the title, to recover certain premises, described in an indenture dated the 5th of May 1856, and situate on the west side of Ballybough-lane, in the parish of St. George,

A deed of assignment of the premises, demised by a lease dated the 20th of October 1824,

for a term of 500 years, contained a covenant on the part of the assignee to expend £2000 in building houses, within seven years, from the 1st of September 1855. The deed contained a clause of re-entry for breach of the covenant. By a subsequent indorsement, under seal, dated the 12th of November 1856, after reciting that the assignee had built one house, and was desirous to let the remainder of the premises for building ground, the following covenant was entered into on the part of the assignor:—"That in case any penalty or forfeiture shall be incurred under and pursuant to, and for nonperformance of the clauses, covenants, and agreements in the deed reserved, that, in such case, such penalty or forfeiture shall not, in any manner, affect the interest of the persons who may be tenants to said within premises, so as in any manner to deprive such persons of the full benefit of their respective holdings;" and that in case such forfeiture were incurred by the assignee, "that then and in such case, such penalty or forfeiture shall not, in any manner whatsoever, interfere with or affect the interest or property of the persons who might be tenants to said demised premises under the said assignees, &c., so as in any manner to deprive them of the full benefit and advantage of their respective holdings upon the premises; and that in case of any such penalty being incurred, and that any proceedings were taken and rendered effectual on account thereof, the assignor, instead of the assignee, should be entitled to recover and receive the rents to be payable by such persons so becoming tenants to said premises; and that such persons should not be rendered liable to pay any greater sum than the rent originally reserved." The assignee having failed to perform the covenant within the specified period, the assignor brought an ejectment on the title, for breach of the covenant.

*Held*—That notwithstanding that the deed of assignment transferred to the assignee the whole of the interest of the grantor, he might re-enter for condition broken.

*Held also*—That the indorsement did not amount to a release of the condition in the principal deed, but merely to a covenant not to disturb the under-tenants.

*Held also*—That the fact that a receiver had been appointed, and acted over a portion of the premises, on foot of a judgment, registered as a mortgage, obtained by the assignor against the assignee for arrears of rent, did not amount to an eviction, so as to prevent the assignor from taking advantage of the breach of condition; and that the receipt by the receiver, from an under-tenant, of rent, which accrued due after bringing the ejectment, did not operate as a waiver of the forfeiture.



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**HALL.** proved a deed of assignment, dated the 5th of May 1856, between the plaintiff and the defendant Hall, executed in pursuance of a prior agreement, whereby the plaintiff assigned to the defendant Hall, for the consideration therein mentioned, the above premises, comprised in a certain indenture of lease of the 20th of October 1824, to hold to said J. H. Hall, his executors, administrators, and assigns, for the residue of the term of 500 years granted by said lease, subject to the payment of the rents and covenants in said lease contained, &c. The deed contained a covenant on the part of Hall, within seven years, from the 1st of September 1855, to lay out a sum of £2000 in building dwelling-houses, under certain conditions; and also the following proviso:—"Provided always, &c., that if it shall happen that default shall be made in the observance and performance of the aforesaid covenant for building in manner aforesaid, and in making the aforesaid outlay and expenditure, &c., then and thenceforth, and at the expiration of the said term of seven years, it shall and may be lawful for the said W. C. Colville, &c., into and upon the said hereinbefore mentioned premises, or any part thereof, in the name of the whole, to re-enter, and the same to have again, re-possess, and enjoy, as in his or their first or former estate, and as if these presents had never been made; anything herein contained to the contrary," &c. Upon the production of said lease and counterpart, it appeared that subsequently to the execution of said lease, namely, the 12th of November 1856, a deed, by way of indorsement, was drawn upon the assignment, and was executed by the plaintiff and defendant Hall; and which, after reciting that Hall had caused a new brick house to be built on a certain spot of the demised plot of ground, and was minded to let the remainder for building ground; and that it had been agreed between the parties that the incoming tenants shall not be liable to any greater sum than the yearly reserved rent, provided same were at fair and full letting value, and the dwelling-houses erected to be of the proper description; the plaintiff covenanted with defendant Hall, that in case any penalty or

forfeiture should be incurred under and pursuant to, and for non-performance of the clauses, covenants and agreements within reserved and contained, or any of them, by the said J. H. Hall, &c., that then and in such case such penalty or forfeiture should not, in any manner whatever, interfere with or affect the interest or interests, or property of the person or persons, or any of them, &c., who might be tenant or tenants to said demised premises, or any part thereof, under said J. H. Hall, &c., so as in any manner to deprive such person or persons, or any of them, of the full benefit and advantage of their respective holdings upon the premises. And further, that in case of any such penalty, &c., being incurred, and that any proceedings should be taken and rendered effectual on account thereof, he, the said W. C. Colville, his executors, &c., instead of said J. H. Hall, &c., should be entitled to recover and receive the rents to be payable by such person or persons so becoming tenant or tenants to said premises; and that such person or persons should not be rendered, or become in any manner liable, to pay any greater sum than the rent in the within indenture contained, &c.

The plaintiff proved that the sum of £2000 had not been laid out pursuant to covenant: and that the defendant had committed waste on the premises, by raising and conveying away a large quantity of gravel. It appeared also that the plaintiff had caused a receiver to be appointed over the premises, by the Court of Chancery, who received rent from the tenants on the lands in that capacity. He also proved a demand of possession. The defendant went into an unsuccessful case of adverse title; he also proved the Chancery proceedings, under which the plaintiff caused the receiver to be appointed over the said lands; he also produced the attested copy of a judgment for £219. 4s. 1d., obtained by him against the defendant Hall, in the Court of Exchequer, as of Michaelmas Term 1857, on which judgment the proceedings in the Court of Chancery were founded. The plaintiff, in answer to the defendant's evidence, proved that the judgment had been registered as a mortgage on the 11th of December 1857, but the affidavit was defective.

The defendant's Counsel called for a nonsuit, on the ground that the deed of the 5th of May 1856 was an absolute assign-

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ment of all plaintiff's interest in the lands in question; also, because the indorsement on the deed amounted to a waiver of the clause of re-entry in the said deed. The LORD CHIEF JUSTICE directed a verdict for defendant, reserving leave to plaintiff to move for leave to change the verdict into one for the plaintiff, in case the Court should be of opinion either that the indorsement on the deed of 1852 did not destroy the right of re-entry, or that the plaintiff was entitled to possession, as a mortgagee, under the registered judgment.

*W. Burke* and *M'Mahon* contended, first, that notwithstanding the reservation of twenty-one days in the *habendum*, the deed of the 5th of May 1856 operated as an absolute assignment, and that the lessor could alone take advantage of this: 2 *Sanders on Uses*, 5th ed., p. 154, n.; *Throckmorton v. Tracy* (a).

Secondly—That the covenant contained in the indorsement amounted to a release of the condition, inasmuch as it would be impossible to evict the assignee without injuriously affecting the subinterests.

Thirdly—That the entry of the receiver into possession amounted to a partial eviction, and that the defendant was prevented thereby from performing his covenant; and that the condition was not apportionable, and could not be enforced: *Croft v. Lumley* (b); *Knight's case* (c); *Rawlins' case* (d); 2 *Platt on Leases*, p. 332.

Fourthly—That the receipt of rent which accrued subsequent to the breach of covenant amounted to a waiver of the condition: *Dendy v. Nicholl* (e).

*Darley* and *Sidney*, contra, contended, first, that an assignment of leaseholds, like an estate in fee-simple, might be made defeasible on breach of condition.

Secondly—That the covenant in the indorsement amounted only to a covenant not to sue or disturb the undertenants, and did not

(a) Flou. 152.

(b) 5 Ell. & Bl. 648.

(c) 5 Rep. 54 b.

(d) 4 Rep. 52 b.

(e) 4 C. B., N. S., 384.

operate as a release: 6 *Bac. Abr.*, tit. *Release*, p. 604; *Dean v. Newhall* (a); *Hutton v. Eyre* (b); *Lacy v. Kinaston* (c); *Mann v. Stephens* (d); 8 & 9 *Vic.*, c. 106, s. 5; *Willis v. De Castro* (e).

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Thirdly—That the possession of the receiver was not an eviction: *Lessee Blakeney v. Higgins* (f); *Groome v. Blake* (g); 1 *Furlong's Land. and Ten.*, p. 566.

Fourthly—On the question of waiver, they cited *Doe d. Griffiths v. Pritchard* (h); *Doe d. Moorcroft v. Meux* (i); *Jones v. Carter* (k); *Cole on Ejectment*, p. 408.

*Cur. ad. vult.*

MONAHAN, C. J.

This was an ejectment on the title, tried before me during the Sittings after last Hilary Term. The plaintiff was the lessor or grantor in an instrument dated the 5th of May 1856, and made to J. H. Hall, the defendant. The ejectment was brought on the allegation that, by reason of a breach of condition, contained in this instrument, the estate and interest of Hall had been forfeited, and that Colville had a right to re-enter. It appeared at the trial, that the period for the performance of the covenant, by the breach of which the forfeiture was alleged to have been committed, expired on the 25th of September 1862. The ejectment was brought on the 4th of November 1862. Evidence was given that the plaintiff, in the year 1857, had recovered a judgment against the defendant for a breach of covenant and non-payment of head rent; and that having registered the judgment as a mortgage against the premises, he had a receiver appointed over them by the Court of Chancery. It also appeared that the receiver in the cause, after the ejectment was brought, that is, on the 24th of November 1862, received from one of Hall's occupying tenants the half-year's rent due by him to Hall, on the 1st of November 1862. Defendant's Counsel took

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(a) 8 T. R. 168.

(c) 1 Ld. Ray. 688.

(e) 4 C. B., N. S., 216.

(g) 8 Ir. Com. Law Rep. 428.

(i) 1 C. & P. 346.

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(b) 6 Taunt. 289.

(d) 15 Sim. 377.

(f) 4 Ir. Jur., 17.

(h) 5 B. & Ad. 765.

(k) 15 M. & W. 725.

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several objections to the plaintiff's right to recover in the ejectment; first, that although by the *habendum* the term granted was 300 years, less by twenty-one days, that the premises of the deed purported to give the whole term without reservation: and it was argued that it was in legal effect an assignment, and not an under-lease; and therefore, as there was no reversion in Colville, it was insisted he could not maintain an ejectment for the alleged forfeiture. Secondly—that Colville having had a receiver appointed over the premises by the Court of Chancery, and having in that way entered into possession, that that amounted to an eviction of the defendant out of possession, so that Hall could not afterwards build on the demised premises; and Colville could not therefore, avail himself of the alleged forfeiture. Thirdly—it was insisted by defendant's Counsel, that the effect of the receiver having received the half-year's rent due on the 1st of November 1862, from one of the occupying tenants, after a breach of the condition, was to recognise the lease as still existing; and therefore that the ejectment could not be maintained. Fourthly—that the effect of the indorsement of the 12th of November 1856, on the lease, was to release the condition. I certainly was of opinion that the condition was released, and directed a verdict for the defendant; but reserved liberty for the plaintiff to move to have the verdict, which I directed for the defendant, changed into one for him, if I should have overruled the several objections taken by the defendant's Counsel, and directed a verdict for the plaintiff. Plaintiff's Counsel, in the opening of his case, relied on the judgment which had been registered as a mortgage, taking the legal estate out of Hall, and therefore that the plaintiff, as mortgagee of Hall's interest, could maintain the ejectment. This was abandoned; and we have now only to consider the validity of the objections which were taken by defendant's Counsel, and which I have already mentioned. With regard to the first objection, that the *habendum* and the premises of the deed are not consistent, the question arises in this way, this deed of the 5th of May 1856, recited a lease of the 4th of October 1824, made between certain trustees of the one part, and W. C. Colville of the other part, and which lease, amongst other

stipulations, contained a covenant on the part of the lessee to expend a sum of £2000, within five years, in building on the demised premises; it further recited that Hall had agreed to purchase all the estate and interest of Colville, subject to the rent and covenants reserved in the lease.—[His Lordship referred to the clause in the lease.]—It was argued from that, that there was no reversion in the plaintiff enabling him to maintain this ejectment. It is not necessary to consider what estate passed in the present case; for even if the argument be well founded that Colville had no reversion, but had assigned absolutely to Hall all his interest for the unexpired residue of the term for which he held, but on condition that Hall should build on the premises within seven years, and that in case of default the grantor should have a right to re-enter, there is no principle of law to the effect that such a clause of re-entry could not be enforced, although there should be no reversion retained by the grantor. The very point arose in the case of *Doe v. Bateman* (a). The facts of that case were these, a party in possession of a term of years demised his whole interest, reserving to himself a right of re-entry upon the breach of the condition; this not having been performed, the lessor, re-entered without bringing an ejectment: the tenant, having brought an ejectment, insisted that the landlord had no right of re-entry, there being no reversion in the lessor. The Queen's Bench held that no reversion was necessary; as in the ordinary case in which a man seised in fee conveys the estate, subject to a condition of re-entry, where, even since the statute of *Quia Emptores*, it has been held that the grantor can re-enter for condition broken. No question arises as to how this right would be affected by the death of the party to whom the right had been reserved; I need not therefore speculate on such a case. I am reminded that an objection was taken during the argument, though not at the trial, to the effect that no re-entry was proved at the trial. No such objection was taken at the trial; and we do not think that it was open to the defendant on the argument; had it been taken at the trial it might have been removed. The

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point saved at the trial was, that a verdict should be entered for the plaintiff, in case I ought to have overruled all the objections taken by the defendant. We do not therefore feel bound to consider whether this proof of re-entry ought to have been made

The next-question in point of order was, that Mr. W. C. Colville's entering into possession by the receiver was a legal eviction of Hall, and that it was sufficient to prevent Mr. Colville from availing himself of the right of re-entry. We do not think that the fact of the plaintiff being a creditor of the defendant, and having obtained the appointment of a receiver, was such an eviction. We know that although a receiver be appointed nominally over all the lands in a matter, yet that he only enters into the part in possession of the occupying tenants, the residue continuing in the possession of the defendant until they are set; and we are of opinion that if Hall had been willing to lay out the money, and had the means, the appointment of the receiver need not have prevented him from doing so.

Then, as to the third objection, that the receipt of the half-year's rent due on the 1st November, after the ejectment was brought, recognised the existence of the tenancy, and therefore that the ejectment could not be proceeded with; it occurs to us that no act of the receiver, dealing with an occupying tenant of Hall, could bind Colville. No principle or authority can be cited in support of the proposition that the receipt of rent from occupying tenants is equivalent to a receipt of rent due by the mesne tenant to the head landlord. That brings us to what occurs to me to be the substantial question in the case.

This case has been discussed at considerable length; and although we have arrived at an unanimous conclusion (my Brother KNOX taking no part in the judgment of the Court, as he did not hear the argument), yet we have come to it with difficulty. The case however is on a point saved in such a way that the party against whom we decide can, as of right, have our decision reviewed in another Court. I may observe, that for some time I entertained a very different opinion from that which I now do. It is necessary that I should state the contents of the lease somewhat fully. As I

mentioned already, the deed from Colville to Hall is not, in form, a lease, but is an absolute assignment; reserving twenty-one days of Colville's interest in the premises, subject to the rent payable by Colville to the head landlord, and to a covenant, not that he would pay the rent to Colville, but that he would indemnify him against it—[His Lordship read the covenant respecting the outlay of the £2000.]—It is quite clear that the only remedy Mr. Colville had for enforcing this covenant, except by bringing an action of covenant, was by the exercise of the right of re-entry, and thereby completely evicting the interest of Hall. At the time of the execution of the lease, Colville himself was under a covenant to expend £2000 in buildings on the premises: so the object of the deed and covenants was to indemnify and secure Colville against the reserved rent, and the risk of an increased rent being enforced, in case of the non-performance of the covenants. In that state of things, I have no doubt Mr. Hall found a difficulty in selling portions of the premises to persons willing to build thereon; as they naturally were apprehensive that their interest and expenditure might be lost, in consequence of Hall's neglect to have the entire £2000 expended within the prescribed time. Under these circumstances, this memorandum was executed.—[His Lordship read it.]—Now, the question is, what is the true construction of this indorsement? Does it operate as a release of the creditor in the lease, so as altogether to deprive Mr. Colville of his right of re-entry, or does it operate as an agreement on the part of Mr. Colville not to disturb the occupying tenants, but permit them to hold on the old terms, notwithstanding a forfeiture of Hall's interest? The first thing to consider is, what was the intention of the parties, as to the effect which the forfeiture should have? There can, I think, be no doubt that the parties in fact intended that this Mr. Colville, in the event of a forfeiture by Hall, should retain the right of re-entry, so far as Hall was concerned; but that, at the same time, the occupying tenants should not be disturbed, but that, instead of remaining tenants of Hall, they should become tenants of Colville, for the terms and at the rents which had been payable by them to Hall; provided the lettings by Hall had been made at the full and fair

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value, and that the premises had been built in accordance with the covenant in the lease to Hall. It is plain that all these intentions cannot be carried out.

If we hold that this indorsement operates as a release, its effect will be to operate, not merely for the benefit of the under-tenants, but for the benefit of Hall; because a condition cannot be released in part; and consequently the under-tenants would continue to hold under Hall, and Colville would altogether lose his right of re-entry, even as against Hall. But, on the other hand, if we construed this, not as a release, but that, consistently with the intention of the parties, the plaintiff is to retain his right against Hall, we could not give to the under-tenants the full benefit it was intended that they should get by this indorsement; which was that, notwithstanding the condition of re-entry, they should be entitled to remain in possession, paying their rents for the future to Colville instead of Hall. But we are of opinion that, without holding this to amount to a release, we can give to the indorsement such a construction as will best carry out the intention of the parties.

There is no class of cases more numerous than those in which the question discussed was, what instruments are to be held to operate as releases, and what merely as covenants not to sue. We have been referred to a very large number of those cases, to which I do not consider it would be at all useful for me now to refer: I consider it sufficient to refer to one, in which most of the previous cases were considered, and in which the principle which governs them all is clearly laid down—I mean *Willes v. De Castro* (a). To a covenant for goods sold and delivered, De Castro pleaded that the goods were sold to him jointly with three others; that there was no joint and several contract; and that Willes, by deed, had released the three others. A replication was filed, to the effect that though the words of the deed, in one part, purported to release them, yet in an earlier part of the same deed the rights of the creditors against other parties liable for the payment of the debts were reserved; and that, in consequence, the plaintiff had saved his right against De Castro. The question for the consideration of the

(a) 4 C. B., N. S., 216.

Court was, whether the deed should, by reason of the words of release, be construed as a release or only as a covenant not to sue, on the ground of the reservation against third parties contained in the instrument? The Court decided, first, that the doctrine of actual release applied to cases, not only of joint and several debtors, but also where the debtors were merely joint; and, secondly, that although in the case before them there were words of actual release, yet the instrument should not have that operation, because the deed purported to reserve rights against third parties, which could not be effected if the deed were held to operate as a release. Now to apply that case to the present:— There are here no technical words of release. I do not say that an instrument will not operate as a release without technical words of release, if to carry out the intention of the parties it be necessary that it should so operate; still it is material that the words used are, not of release, but of agreement, namely, that the "incoming tenants" shall not be liable to any greater sum than the yearly reserved rent; &c. &c.—[*Vide ante*, p. 267.]

The intention prevails throughout that the rights of Mr. Colville should be preserved as against Hall; the object being, to preserve the power of evicting him, and retaining the under-tenants as immediate tenants to Colville. This cannot be done, if we hold the instrument to amount to a release; for in that case all right of eviction would be gone. Then, what mischief will arise to the occupying tenants by the other construction? We cannot certainly pretend to give them everything which they would appear to have had by the instrument; but if we hold this to be a covenant not to evict, there can be no doubt but that, if Colville were to execute an *habere* against the occupying tenants, Hall could maintain an action against him for breach of covenant; and if the tenants dealt with Hall on the faith of this instrument, it appears to me clear that they would have the right, in Hall's name, for their benefit, to proceed against Colville. This is irrespective of any question that might arise, whether the tenants would be entitled to relief in Equity, by obliging Colville to execute new leases on the terms of the old. On this we give no

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opinion; but I am not satisfied that if the tenants could show that they became such on the faith of this agreement, that Hall, in that case, would not be held to be a trustee for their benefit, and in that way that they would be entitled to equitable relief. I may observe, that the recent Landlord and Tenant Act seems to provide for a case of this description, by the 94th section; and if the plaintiff chooses to execute his *habere* without disturbing the occupying tenants, the latter may execute an attornment, in the form given by the Act: so that if the plaintiff chooses to perform his contract in that way, the result will be that the under-tenants will continue to hold for the original term, at the former rent.

Having given to the case the best consideration in our power, we think that we shall better give effect to the intention of the parties by holding this indorsement not to be a release, but merely a covenant not to sue. The verdict will therefore be entered for the plaintiff; but we think it a case in which the parties should abide their own costs of the motion.

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Exchequer.

HAYES v. STIRLING.—SHAW v. STIRLING.  
DUDGEON v. M'BIRNIE—MADDEN v. CUSACK.\*

(Exchequer.)

Nov. 5, 11.

This was a demurrer to the summons and plaint, which, in the cases of *Hayes v. Stirling*, *Shaw v. Stirling*, and *Dudgeon v. M'Birney*, which were consolidated, ran as follows:—

The plaintiff complains that heretofore, to wit, on the 1st day of June 1862, the defendant and certain other persons, whose names are to the plaintiff unknown, agreed together to form a joint-stock company called "The Rolling-stock Company of Ireland (Limited);" and the defendant, &c., to wit, on the day and year last aforesaid, caused to be issued and published, and circulated a prospectus of said Company, called "The Rolling-stock Company of Ireland (Limited)," in which prospectus the name of the defendant appears as director; and which prospectus contained, amongst other things, the words and figures following:—"The "Rolling-stock Company of Ireland (Limited), for the building, "sale, and letting on lease, or otherwise, of railway carriages and "waggon; capital £200,000, in £20,000 shares of £10 each; "deposit on application £1 per share, and on allotment £1; calls "not to exceed £1 per share, and three months' interval between

To sustain an action for money had and received, against a person named as a director of a projected Company, by a proposed subscriber, for his deposit, two things must be shown; first, that the money so paid came to the defendant's hand or power for the purpose of being applied to the objects of the projected Company; and, secondly, that the project failed, by reason of no Company, or no Company conformable to the prospectus, having been formed.

To a summons and plaint which averred, that the defendant represented himself to be a director, and required payment of a deposit by any applicant for shares, to be made to persons named by him as the bankers of the Company, and that the plaintiff, in reliance on the representation so made by the defendant, paid to the bankers of the Company, who were his agents in that behalf, the amount of the deposit, the defendant demurred, as it was not shown that the money came to the defendant's hands. Demurrer disallowed.

The natural meaning of the averment, "That the scheme detailed in the prospectus wholly failed, and became abortive, and had been totally abandoned," is, that the consideration upon which the deposit was paid had wholly failed.

\* *Coram* FITZGERALD, HUGHES, and DEASY, BB. The LORD CHIEF BARON was sitting at a general Nisi Prius.

M. T. 1863. "the successive calls. Bankers; London—Metropolitan and Provincial Bank, Cornhill: Dublin—Provincial Bank of Ireland, "and its branches. Temporary offices, 26 Old Broad-street."

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That the defendant, in and by said prospectus, further stated and represented that, the operations of the said Company would be commenced in Dublin, and that many of the existing Railway Companies in Ireland were prepared to avail themselves of the facilities which the said Company would place at their disposal; that the Company would be prepared to undertake the supply of the entire rolling-stock for railways, or to lease the working of lines; and that the deposit of £1 must be paid to the Company's bankers upon each share, previous to the application being sent in. That therefore, confiding in the representations and statements so made by the defendant in said prospectus, the plaintiff applied for two hundred shares in said Company, upon the conditions, &c., for the purposes set forth in such prospectus, and none other. That, to wit, on the 26th day of July 1862, plaintiff paid into Company's bankers, to wit, the said Metropolitan and Provincial Bank, and who were then the agents of the defendant in that behalf, in pursuance of said prospectus, a sum of £200, being a deposit of £1 per share, upon the shares so applied for; and said shares were allotted to plaintiff; and, to wit, on the 3rd day of November 1862, plaintiff paid to defendant's bankers, to wit, the said banks, in pursuance of the said prospectus, a further sum of £200, being the payment, in accordance with the said prospectus, upon the said shares. And the plaintiff saith, that said scheme so detailed in said prospectus by the defendant thereupon forthwith wholly failed, and became abortive, and has been totally abandoned; whereby an action hath accrued to the plaintiff to demand and have from the defendant the said sums, amounting to £400, so paid as aforesaid by plaintiff to the said bankers of the defendant, pursuant to the said prospectus; and plaintiff has demanded said sum from defendant, and defendant has refused to pay same, to this plaintiff's damage of £400.

In the case of *Madden v. Cusack*, the summons and plaint

contained some additional averments, which appear in the judgment of the Court. Then followed counts for money payable, &c.; for money paid; for money found to be due on account stated; and for interest on said money.

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The defendant pleaded to the first count, a traverse of the publication of the prospectus; a traverse of the payment of the £400 by the plaintiff in the manner alleged; a traverse of the allegation that the said scheme wholly failed or became abortive, or was wholly abandoned. He also traversed all the money counts.

By leave of the Court, the defendant also demurred to the first count. The following were the points of demurrer:—

First—Because the defendant being only a provisional committee-man, and the payments being made to the Company's bankers, no personal liability by the defendant is disclosed.

Secondly—Because the only liability inferrible from the facts, is the liability of the Company.

Thirdly—Because a joint liability is inferrible.

Fourthly—Because the payments were alleged to have been made on the faith of misrepresentations in the prospectus, which was issued by the Company after its formation, and not by the defendant as an individual.

Fifthly—Because the money was lodged with the Company's bankers unconditionally and without any stipulation, express or implied, that same should be returned to the plaintiff as a depositor.

Sixthly—Because no acts or defaults of the defendant are alleged whereby the scheme became abortive.

Seventhly—Because it is inconsistent with the statements in the summons and plaint that the scheme was legally wound up and abandoned, and that without any default on the part of the Company or the defendant; and may have been wound up by the shareholders.

*George O. Malley* (with whom was Serjeant *Armstrong*), for the demurrer.

The Company alone are liable to the plaintiff. The deposit and

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**STIRLING.** calls on shares are directed, by the prospectus, to be paid to the bankers of the Company, not to the bankers of the defendant. In order to make him liable, the money must be traced to his hands, and proved to have been paid upon his representations: *Watson v. The Earl of Charlemont* (a); *Burnside v. Dayrell* (b).

*Palles* and *D. C. Heron*, in support of the pleading.

If money be paid by A to B, by B's directions, or to a person appointed by B, when the consideration fails, B is liable to A: *Lindley on Partnership*, p. 69, and the cases there collected: *Wontner v. Sharp* (c); *Nockrells v. Crosbie* (d).

As the Rolling-stock Company never came into existence, the scheme is properly said to have become abortive. The pleading is framed on *Wallstaff v. Spoteswode* (e). The allegation that the Company became abortive is sufficient: *Ashpittle v. Seacombe* (f); *Johnson v. Goslett* (g); *Ward v. Lord Londesborough* (h).

Serjeant *Armstrong*, in reply.

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MADDEN v. CUSACK.

*O'Driscoll* (with whom was *W. Brereton*), appeared for the defendant, in support of the demurrer.

*Palles* and *D. C. Heron*, in support of the pleading.

*Cur. ad. vult.*

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FITZGERALD, B., now delivered the judgment of the Court.

Nov. 11. In the cases of *Hayes v. Stirling*, *Shaw v. Stirling*, and *Dudgeon v. M'Birnie*, the pleadings are the same to all intents.

In each case, the summons and plaint states in substance:— That in June 1862, the defendant and certain other persons agreed together to form a joint-stock Company, called "The Rolling-stock Company of Ireland (Limited)," for the purpose of the building

(a) 12 Q. B., N. S., 856.

(b) 3 Exch. 224.

(c) 4 Com. B. 404.

(d) 3 B. & C. 814.

(e) 15 M. & W. 501.

(f) 5 Exch. 147.

(g) 3 Com. B., N. S., 728.

(h) 12 Com. B. 252.

and sale, and letting on lease or otherwise, of railway carriages and waggons; and the defendant published a prospectus of the said Company, on which his name appeared as director; and which stated that the capital of the Company was to be £200,000, in 20,000 shares of £10 each; that the deposit on each application was to be £1, and on allotment £1; that the bankers of the Company in London were the Metropolitan and Provincial Bank, Cornhill; and in Dublin the Provincial Bank of Ireland. That the defendant, by the said prospectus, also stated that the operations of the Company would be commenced in Dublin, and that the deposit of £1 must be paid to the Company's bankers upon each share, previous to the application being sent in. The summons and plaint further states—That the plaintiff, confiding in the representations and statements so made by the defendant, applied for fifty shares in the Company, on the conditions and for the purposes set forth in the prospectus. That in July 1862, the plaintiff paid to the Company's bankers, the Metropolitan and Provincial Bank, who were the agents of the defendant in that behalf, in pursuance of the said prospectus, a sum of £50, being a deposit of £1 per share on the shares so applied for. That fifty shares were allotted to the plaintiff, who afterwards, in August 1862, paid to the defendant's bankers, the Provincial Bank of Ireland, in pursuance of the said prospectus, a further sum of £50. The summons and plaint then avers that the said scheme, so detailed in the said prospectus, forthwith wholly failed and became abortive, and has been totally abandoned; whereby an action has accrued to the plaintiff to demand from the defendant the said sums, amounting to £100, so paid by the plaintiff. In each of these cases the summons and plaint has been demurred to.

On the argument of the demurrer, there has not been much difference between the parties as to the law applicable to the case. In effect, the cause of action is money had and received by the defendant in each case, to the use of the plaintiff. The paragraph in this special form being, in my opinion, most unnecessarily made use of. To sustain such an action against a person named as the director of a projected Company, for money paid by a proposed

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subscriber as his deposit, two things must be shown; first, that the money so paid came to the defendant's hands or power, for the purpose of being applied to the purposes of the Company projected, when established; and, secondly, that the project failed by reason of no Company, or no Company conformable to the project, having been formed. The substantial grounds of demurrer relied on were, that the summons and plaint in none of these cases did show that the money sued for came to the defendant's hands, nor show that a Company conformable to the prospectus, was not established. It seems to me that, it being admitted that the statements in the prospectus were the representations of the defendant, he did represent the purposes of the Company to be those therein stated; that he represented himself to be a director, and that he required the payment of a deposit, by any applicant for shares, to be made to persons named by him as the bankers of the Company; and it being averred, and admitted by the demurrer, that the plaintiff, in reliance on the representations so made by the defendant, paid to the bankers of the Company, who were his agents in that behalf, the amount of the deposit; it is sufficiently averred that the money came to the defendant's hands.

It further seems to me, that the natural meaning of the allegation that the scheme detailed in the prospectus wholly failed and became abortive, and has been totally abandoned, is, that the consideration on which the money was paid, that is to say, to be applied to the purposes of a Company such as that mentioned in the prospectus, when established, wholly failed.

I think therefore that the demurrer in each of these cases must be overruled.

In the case of *Madden v. Cusack*, the summons and plaint, which has also been demurred to, is the same with that in each of the other cases, except that, after alleging the payment of the moneys by way of deposit, it states that at the time of application for shares, the Company described in the prospectus was not established; but that afterwards, in August 1862, a Company was

incorporated, under the title named in the prospectus, "for purposes  
"and on conditions different from, and inconsistent with, those set  
"forth in the prospectus;" that such Company, without a reason-  
able amount of its shares having been allotted, or a reasonable  
amount of its capital having been subscribed or paid, and without  
having commenced to carry on business, or being able to carry on  
business, was secretly, and without notice to the applicants for  
shares, amalgamated with another Company; and that no Company  
has ever been formed, or now exists, pursuant to the said prospec-  
tus; and the scheme so detailed in the prospectus wholly failed and  
became abortive, and has been wholly abandoned.

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This also appears to me to be a sufficient statement of the failure  
of the consideration on which the plaintiff's money was paid to the  
defendant.

The contract on which money is paid in such cases is, that it  
shall be applied for the purposes of a Company, conformable to the  
prospectus, when fairly established; and it being admitted by the  
demurrers, in each of the cases before us, that no such Company as  
that mentioned in the prospectus was ever established, but that the  
scheme detailed in the prospectus has failed and been wholly aban-  
doned, and it being also admitted that the money was paid to the  
defendant's agent, and by his direction, upon the faith of his repre-  
sentations, I think the consideration on which the money was paid  
has failed, and that, in each case, the demurrer ought to be over-  
ruled.

Demurrer overruled.

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Jan. 16, 19.

## GIBBONS v. CUSACK.

To an action for breach of a promise to marry, a defence, alleging "that before and at the time of the making of the agreement," &c. &c., "the plaintiff was a woman of unchaste and immoral behaviour, and of incorrect and immoral habits and conduct, and of bad conduct and reputation," is bad, for vagueness, and for omitting to disclose the names of the persons with whom the defendant alleges that the plaintiff has been guilty of immorality.

THIS was a motion to set aside one of the defences, in an action for breach of a promise to marry. The motion had been moved before HUGHES and DEASY, BB., sitting in Banco after Michaelmas Term 1863, and they had directed the case to stand over until this Term, as their Lordships differed in opinion.

*Devitt*, for the plaintiff, now moved that the defendant should amend, either by adding the name or names of the parties with whom he charged the plaintiff to have been guilty of immoral conduct, or to allege that the persons were unknown to him. He referred to *Godfrey v. Cross* (a); *Baddeley v. Mortlock* (b); *O'Brien v. Clement* (c); *J'Anson v. Stuart* (d); *Foulkes v. Selway* (e). The plea, as pleaded here, first appears in *Pearson's Chitty*, 2nd ed., p. 362. It is given in *Bullen and Leake's Prec. in Pleading*, p. 548 (1st ed.), and is taken from *Bench v. Merrick* (f).

*McMahon*, contra, cited *Noden v. Johnson* (g).

*Devitt*, in reply, cited *Jones v. Stephens* (h); *Bewley v. Brown* (i); *Young v. Murphy* (k); and *Gainty v. Fitzmaurice*, in this Court, but unreported.

*Cur. ad vult.*

Jan. 19. The LORD CHIEF BARON now delivered the judgment of the Court.

To the summons and plaint, complaining of the defendant's breach of his agreement to marry the plaintiff, the defendant has

(a) 12 Ir. Com. Law Rep. 333.

(c) 16 M. & W. 159.

(e) 3 Esp. 235.

(g) 16 Q. B. 218.

(i) 1 Ell., Bl. & Ell. 796.

(b) 1 Holt, 151.

(d) 1 T. R. 748.

(f) 1 C. & K. 463.

(h) 11 Price, 235.

(k) 3 Bing. N. C. 54.

put in a defence, alleging that "the plaintiff, before and at the time of the making of the said agreement in the writ of summons and plaint mentioned, was a woman of *unchaste and immodest behaviour*, and of *incorrect and immoral habits and conduct*, and of *bad character and reputation*; which the defendant first discovered after the making the said alleged agreement, and before the alleged breach;" and, in the defence, he relies on those matters as discharging him from the performance of his agreement to marry. The plaintiff has moved the Court to set aside this defence, as embarrassing; on the ground "that it does not disclose the names of the persons with whom the defendant alleges that the plaintiff was guilty of immorality;" and on the ground "that the charges in said defence mentioned are too vague."

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The defence, it will be perceived, contains three allegations. The first imputes "unchaste and immodest behaviour;" the second imputes "incorrect and immoral habits;" and the third imputes that the plaintiff was of "bad character and reputation."

With respect to the first, it contains a direct charge of want of chastity. The proper proof, of that charge would consist of evidence of the plaintiff's having had illicit intercourse with some person of the other sex. The second imputation contains a charge founded on habits and conduct; and the proper evidence to support that charge, would be proof of acts indicative of such habits and conduct. If this were a defence pleaded to an action for a libel, imputing the alleged misconduct, the defence must, according to well-established authorities, have been held bad upon demurrer, before the Common Law Procedure Act, and ought, under that statute, to be set aside, as embarrassing, for want of that certainty which the law requires in defences of that nature. The principle of decision in *J'Anson v. Stuart* (a) and *Jones v. Stephens* (b), followed by several more recent decisions—among them *Hickinbottom v. Leach* (c)—requires that where the misconduct imputed involves a number of acts, they must be stated, in order to give to the opposite party notice of that which he has to meet in evidence;

(a) 1 T. R. 748.

(b) 11 Price, 235.

(c) 10 M. &amp; W. 361.

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otherwise, where no act of misconduct is charged against him, but a general imputation only is made, he might be called on to be prepared, at the trial, to prove his whole conduct through life. It was said, in the argument before us, that this rule, which the Courts of Law have applied to pleas of justification in libel and slander, does not apply to such an action as this, which is founded on contract; and the case of *Young v. Murphy* (a) was cited as an authority for that distinction. That case is also reported in 3 *Scott's Reports*, p. 379, and 2 *Hodges*, p. 144. In each of the reports the judgment of the Court is given in three or four lines; and the exact ground of decision does not clearly appear. The judgment is reported somewhat more fully in 2 *Hodges*, p. 147, than in the other books. The second plea in that case (which was an action for breach of promise of marriage), stated that, after the agreement to marry, the defendant discovered that the "plaintiff was an immodest, lewd, "unchaste, and immoral person; and, being sole and unmarried, "had had carnal intercourse with, and was carnally known by, and "had committed fornication with," a person named in the plea. The third plea alleged the discovery (made by the defendant after the promise) that the plaintiff had committed fornication with some person or persons to the defendant unknown, and was pregnant with a child, which was afterwards born, and which was an illegitimate child. These pleas were demurred to; and the chief grounds of demurrer to each plea were, duplicity and uncertainty. The second plea was alleged to be double, in this, that it relied upon two matters—first, that the plaintiff was an immodest, lewd, unchaste, and immoral person; and, secondly, that she had had an illegitimate child. And it was further objected that the first allegation was too general. As to the third plea, it was objected that it relied upon two matters—first, that the plaintiff had had illicit intercourse with some person or persons unknown; and, secondly, that she had had an illegitimate child. The plaintiff's Counsel, in support of the demurrer, relied on the rule which was laid down in *J'Anson v. Stuart* and *Jones v. Stephens*, and which was also applied in *Holmes v. Catesby* (b). Lord Chief Justice Tindal

(a) 3 Bing. N. C. 54.

(b) 1 Taunt. 543.

having intimated, in the course of the argument, that the plaintiff might put the whole in issue by the general traverse *de injuria*, gave judgment (as reported in 2 *Hodges*, p. 147), without calling on the defendant's Counsel to support the pleas, by simply saying—"In the cases which have been cited, the defendants, who had published libels, were wrongdoers. Here the defendant is put upon his defence. It appears to me that the general replication *de injuria* would put all the matters in issue. The plaintiff had better amend, by taking issue on the pleas." The plaintiff elected to amend accordingly. It has been contended, before us, that the case of *Young v. Murphy* is an authority for confining the rule applied in *JAnson v. Stuart*, and in the other cases which I have mentioned, to pleas of justification in actions of libel and slander, and for exempting from that rule all actions on a contract, such as the present action. Such an inference may perhaps be drawn from the few words in which the judgment in *Young v. Murphy* is reported. But it would seem that, in truth, the decision in that case may well be sustained upon the ground intimated by the Court, in the progress of the argument, and mentioned also in the judgment, as reported in 2 *Hodges*, p. 147. Each plea contained an imputation of misconduct, coupled, in the same sentence, with a statement of a specific fact, quite sufficient in itself to sustain the imputation; and if that was so, the Court were warranted, on that ground, in holding that the whole might have been put in issue by the general traverse *de injuria*. I may observe, that in *Bewley v. Brown* (a), Mr. Justice Hill (a high authority in pleading, as well as in every other branch of the Common Law) treated the case of *Young v. Murphy* as one in which there was no decision that the pleas were properly framed. He stated that the marginal note was not justified by the case, that there was no decision, and that the plaintiff amended. That the rule requiring that a plea relying on the plaintiff's misconduct, should specify the misconduct, and should not contain a general charge only, applies to an action on a contract, was determined by the same Court

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(a) 1 ELL., BL. & ELL., 798; S. C., 2 L. J., Q. B., 196.

H. T. 1864. *Exchequer.* which decided *Young v. Murphy*, in a case of *Burgess v. Beaumont* (a), which was not cited to us at the Bar. That was an action for the breach of an agreement, to make the plaintiff (who had been governess in the defendant's family) an annual allowance for her maintenance and instruction, until the plaintiff should be required by the defendant to resume her situation. The defendant pleaded that he entered into the agreement in the belief, and on the representation by the plaintiff, that she was an honest and moral person, and a fit and proper person for the situation and employment in the declaration mentioned; and that, before any breach of the agreement, he discovered that the plaintiff had become, and was, an immoral and dishonest person, and wholly unfit and improper for the situation and employment aforesaid, and a person whom it would have been improper and wrong for him to employ as a governess and teacher of his children. The decision in *Young v. Murphy* was relied on, as distinguishing the case before the Court, in *Burgess v. Beaumont*, from those in which the rule in *J'Anson v. Stuart* had been applied to actions of libel and slander. But the Court held the plea too general; and applied to it some of the reasons which appear to have chiefly influenced the Judges in *J'Anson v. Stuart* and *Jones v. Stephens*. Lord Chief Justice Tindal said:—"I think this plea a great deal too general. "In order to meet the case which might be set up against her, the "plaintiff would be compelled to come prepared with witnesses to "justify her whole conduct from the day mentioned in the plea, "without having any intimation with what particular misconduct "the defendant meant to charge her." Mr. Justice Coltman was of opinion that, whether the case fell within the rule which has been laid down as to slander or not, there must be a certain degree of certainty in every plea; and that the plea in question was much too general. And Mr. Justice Erle said:—"The plea does not "give the plaintiff notice of the charges which she is called upon "and must come prepared to meet." And the Court gave judgment for the plaintiff; refusing the defendant leave to amend.

I think as to the two first imputations contained in the defence

now before us, that they are to be dealt with upon the principle which governed the decision in *Burgess v. Beaumont*. In each of those imputations the allegation is too general. To meet the first, it might be necessary for the plaintiff to come prepared with evidence of her conduct in every house in which she lived; on every journey which she travelled; in every family which she visited; in every company in which she moved; for the purpose of meeting every possible charge in respect of every male acquaintance she had formed during her past adult life. To meet the second, it might be necessary for her to be prepared with similar evidence, as to her conduct and behaviour during the whole period, since childhood, of her past existence. This is a burthen of proof which it would be an intolerable injustice to impose upon any suitor. And it can be avoided by simply obliging the defendant to state, in his defence, those acts of misconduct by which, in evidence, he must support, if he can support at all, the imputations on which he relies. The plaintiff, if innocent, cannot anticipate what she has to meet upon such a defence as this. She cannot know what facts the defendant may, either with or without the persuasion or representation of others, allege at the trial. She ought to be enabled to apply evidence on her part, to prove that representations of her misconduct, if really made to the plaintiff, were false and malicious, or were the result of error and misconception. In truth, the charge of "immoral conduct" is general enough to include any act of immorality in the scale of crime, from lying, drunkenness, or fraud, up to robbery or murder. All the reasons for affording the protection of previous notice, of the misconduct intended to be relied on by the defendant at the trial, appear to exist in a case such as this, which exist in the case of an action of slander. In one view those reasons apply, with still greater force, to such a defence to an action for breach of promise of marriage. In action for slander or libel, the imputation may affect very injuriously, but it may also affect but lightly, the permanent interests of the plaintiff. But in an action brought by a woman for breach of promise of marriage, a defence of this nature, if established on a trial, must be calculated, not

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only to destroy reputation, but to blight, for life, any prospect of happiness or comfort of the plaintiff. And the position of a plaintiff in such an action, as contrasted with that of a plaintiff in an action for slander or libel, suggests, in the present state of the law, a reason why the privilege of learning the particulars of the defendant's imputation on the plaintiff should be conferred (if any were made) even more liberally on the plaintiff who sues for a breach of promise of marriage, than on a plaintiff in an action for defamation. In the latter, the plaintiff may be examined on his own behalf, and, by his own evidence, may, to some extent, remedy the effect of a surprise in unexpected evidence, of matters never intimated before the trial: in the former, the plaintiff is precluded from being examined as a witness.

For these reasons, I am of opinion that this defence cannot be sustained in its present form; that the two first imputations are too general; and that more specific statement must be made of the alleged misconduct on which the defendant relies.

There is another view, in which the language used in the two first imputations contained in this defence is objectionable. The first imputes "immodest behaviour;" the second imputes "incorrect habits." It is wholly uncertain whether the defendant, by these expressions, means to charge the plaintiff, not only with want of chastity and with immorality, with which charges the imputations above-mentioned are coupled, but also with immodest or lascivious behaviour, indicated by language and demeanour which might be evinced, not in her intercourse with persons of the other sex, but in her conversation and behaviour in company with persons of her own. Disgraceful as it would be to merit either class of imputations, they are very different in their nature; and should be proved, or rebutted, by very different kinds of evidence. This view of the case disposes of the motion. The defence must be set aside, unless the defendant shall amend; which we think he may be allowed to do, on the ordinary terms, of paying the costs of this motion and the costs incident to the amendment.

It is unnecessary to determine whether the defendant can rely on such an allegation as that which he makes in this defence, of the

plaintiff's having borne a bad reputation, and of the defendant's having discovered that fact after he had agreed to marry her. A question would arise, if the defence were framed on that allegation alone, whether it would or would not constitute a valid defence to such an action as this? Notwithstanding what appears in *Baddeley v. Mortlock* (a) and *Foulkes v. Selway* (b), that question has not, I believe, been yet formally decided. On the one hand, it might be contended that the promise to marry, made in the belief that the plaintiff bore an unblemished reputation, did not bind the defendant, when he had discovered the fact that her reputation, before and at the time of the promise, had been bad. He might possibly contend that she does not, when he refuses to marry, bring with her that untainted name on the faith of which he agreed to accept her as a wife. On the other hand, it may, with great force, be contended that, if she was guilty of no deception, and had done nothing to misrepresent or conceal the sinister imputations which were cast upon her; if she was innocent of those imputations; if her conduct was pure, and the bad reputation which became attached to her name was the result of misconception or of slander,—the defendant was not exonerated from his obligation to marry an innocent and virtuous woman. And if the case rested upon the imputation of evil repute alone, we should be reluctant to determine the point upon motion, since our opinion could not be recovered; and we should therefore be disposed to let the question be raised by demurrer: but we should not allow the allegation of bad character to be blended with either of the other imputations. If not sufficient in itself, it would be surplusage if either of the others would be sufficient without it; if sufficient in itself, then either the defence would be embarrassing for duplicity, rendering it uncertain on which of several sufficient imputations the defendant would rely; or, if the other imputation were insufficient, it would be embarrassing for containing, in addition to a sufficient ground of defence, an allegation which would let in proof, unnecessary and irrelevant, at the trial.

I have thought it right to deal with this last allegation in the

(a) Hall, V. P. C. 151.

(b) 3 Esp. 236.

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CUSACK. manner in which I have here referred to it, in order that the parties may, without another motion, learn how the Court are disposed to consider the entire of the matters now before us. I, for one, however, do not wish to give any encouragement to the defendant to try the experiment of a defence founded on the alleged evil repute of the plaintiff, irrespectively of her deserving that repute or not, and irrespectively of deception and fraud. If the law applies the rule of *caveat emptor*, for the protection of one who sells a chattel with a defect of which he is ignorant, but which the buyer, with ordinary diligence, could have ascertained before the sale, it may well be that the law will extend a similar protection to a virtuous woman, who accepts an offer of marriage in ignorance of the fact that her character has been falsely aspersed by wanton scandal or by malicious slander. In *Bewley v. Brown* (a) a plea, alleging the defendant's discovery of a fact, not in itself attaching misconduct to the plaintiff, but which, the plea alleged, would have prevented the defendant from asking her to marry him (a previous attachment to another man), was, in the absence of any allegation of fraud or deception, held bad, as not showing valid defence to an action for breach of an agreement to marry.

(a) 1 Ell., Bl. & Ell. 796.

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*Queen's Bench*

## WHARTON v. KELLY.\*

(*Queen's Bench.*)

Nov. 12.

**EJECTMENT ON THE TITLE.**—This was an action of ejectment, brought to recover possession of a dwelling-house and premises, No. 4 Swift's-row, in the city of Dublin. The case was tried before the LORD CHIEF JUSTICE, during the Sittings after Trinity Term in the present year. The plaintiff gave in evidence two documents—one, a proposal by the defendant to become tenant of the premises in question, but which, as it appeared never to have been acted on, was withdrawn from the consideration of the jury; the other, an agreement, which was in the following terms:—

"Memorandum of agreement between the Rev. Joseph Wharton, rector of Ballyburley, in the King's County, of the one part, and Mrs. Bridget Kelly, of Gloucester-street, in the city of Dublin, widow, of the other part. The said Rev. Joseph Wharton agrees to let, and the said Bridget Kelly agrees to take, all that and those the house and premises now known as No. 4 Swift's-row, in the city of Dublin, *for one year certain*, to commence from the 1st day of April 1860, at the yearly rent of £28 sterling, over and above all manner of taxes; the said rent to be payable quarterly, on the 1st day of July, 1st day of October, 1st day of January, and 1st day of April, *in each and every year during the tenancy* of the said Bridget Kelly; the first payment thereof to be made on the 1st day of July next ensuing the date hereof. And the said Bridget Kelly is to be allowed the sum of £1. 10s. *out of each of the first four quarters' rent*, for repairing said house and premises; the receipt thereof to be produced, to satisfy that the said amount has been laid out and expended in repairing said house and premises. And the said Bridget Kelly hereby

By a memorandum of agreement, certain premises were agreed to be let "for one year certain," from the 1st day of April 1860, at a rent payable quarterly on certain days "in each and every year during the tenancy;" and certain allowances were to be made to the intended lessee "out of each of the first four quarters' rent."

*Held*—An agreement for a tenancy from year to year.

The case of *Thompson v. Maberly* followed.

\* Before the Full Court.

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 KELLY. "agrees not to sublet or assign said house and premises : and, further, that she the said Bridget Kelly shall and will give up the quiet and peaceable possession of said house and premises, to the said Rev. Joseph Wharton, in good and tenantable order, repair and condition, reasonable wear and tear excepted.

" Dated this 27th day of March 1860.

(Signed)

" J. WHARTON.

" BRIDGET KELLY."

It appeared that the defendant entered into possession of the premises under this agreement ; and, on the 25th March in the present year, demand of possession was made by the plaintiff, without having served any notice to quit ; and the defendant, having refused to deliver up the possession, the present ejectment proceedings were brought.

It was urged at the trial, on the part of the plaintiff, that, upon the true construction of this agreement, the defendant was tenant for one year, and that the tenancy was terminated by the demand of possession. The defendant, on the other hand, contended that the agreement created a tenancy from year to year, and could not be put an end to without the usual six months' notice to quit.

The learned CHIEF JUSTICE directed a verdict for the plaintiff ; reserving leave to the defendant to have the verdict entered for her if the Court above should be of opinion that, upon the true construction of the agreement, she was tenant from year to year.

On the 4th November, in the present Term, a conditional order having been obtained, pursuant to the leave reserved—

Serjeant *Armstrong* (with him *Blachhum*) now showed cause.

*Heron* (with him *O'Driscoll*) in support of the conditional order.

Serjeant *Armstrong*.

The question here is, as to the construction of this agreement. If the agreement had stopped at the words "for one year certain," the plaintiff's right would have been clear ; and it lies on the defendant to show that there is something in the subsequent words to enlarge that tenancy for one year into a tenancy from year to

year, so as to require a notice to quit. No doubt, if the tenancy had continued after the first year, it would have been a tenancy from year to year, and a notice to quit would have been necessary. This is a case of the first impression ; no agreement precisely similar has been the subject of judicial decision.

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This is a tenancy from year to year. The nature of such a tenancy is this, that the tenant has a right to hold for a year certain, subject to his tenancy being determined by a six months' notice to quit : *Jarman's Conveyancing*, vol. 4, p. 457 ; *Pope v. Garland* (a) ; *Agard v. King* (b). That is precisely the tenancy created by this agreement. It is impossible for any one reading this agreement to say that it was not in the contemplation of the parties that the tenancy should extend beyond the first year. The clause relating to repairs, the words "in each and every year during the tenancy," and "out of the first four quarters," point to a tenancy intended to last beyond the first year. The case of *Thompson v. Maberly* (c) shows that the words "for one year certain" do not necessarily restrict the tenancy to one year. The decision in that case was founded on this, that the terms of the agreement showed that it was in the contemplation of the parties that the tenancy should last beyond the first year.

He cited *Doe d. Shore v. Porter* (d).

*O'Driscoll.*

If you take out of this agreement the words "for one year certain," you have unquestionably a good agreement for a tenancy from year to year ; but to construe this a tenancy for one year, would be to strike out all the subsequent portion of the agreement, and leave nothing but those words, "for one year certain."

*Blackham*, in reply.

(a) 4 Y. & C. 394.

(c) 2 Camp. 573.

(b) Cr. Eliz. 775.

(d) 3 T. R. 13.

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LEFROY, C. J.

We are all of opinion that in this case the verdict should be entered for the defendant. So far as the reasons upon which my judgment proceeds are concerned, I merely say, that, as well upon the words of the contract itself, as upon the construction which Lord Ellenborough has put upon what I may call equivalent words, this contract must be construed as creating a tenancy from year to year. I would say at the outset, if these parties only meant to contract for one year, why did they not stop at the words "*for one year certain?*" and then they might have had a good contract for one year. Why did they add anything more? It is said they contemplated the possibility of a future tenancy, or the possibility of a continuance of the tenancy. But are we to suppose that the parties contracted, not with respect to an actual tenancy, but with respect to a possible tenancy? Much more natural that they should contract for, that they should show they were providing for, a future event—and that an actual event, not a possible one. Why add anything to those words, which would have constituted a good contract for a year? Why enter so elaborately into what should be the nature of the tenancy at the expiration of the year? Why were there prospective words inserted, if they did not mean to provide for a future tenancy? In my opinion, upon the principle that effect should be given to every word of a contract, if possible, these parties have provided for a future tenancy; and they have done so by words which fully bear out that they contemplated a tenancy embracing futurity.

If we construe this contract according to the rule I have adverted to, so as to give effect to those words which glance at and show a contemplation of a continuing tenancy, the construction that I have put upon it will be very strongly supported by the words "in each and every year during the tenancy," and "each of the first four quarters." These latter words are relative; they relate to succeeding quarters, and of a tenancy which the parties were very naturally providing for—an actual tenancy, not a possible one. The decision of Lord Ellenborough in the case of *Thompson v. Maberly* (a),

(a) *Ubi supra.*

when construing equivalent words—words upon which strong reliance was placed in the argument, as they contained an express provision for a tenancy for twelve months certain,—is important. His judgment, in construing that contract was founded on this, that although these words “for twelve months certain” occurred there, yet the superadded words gave to that contract the effect of creating a tenancy from year to year.

Therefore, following the construction so put by Lord Ellenborough upon those equivalent words, I am of opinion that in this case the true construction of the contract was to create a tenancy from year to year.

O'BRIEN, J.

I am also of opinion that the point reserved at the trial should be ruled in defendant's favor. The question depends entirely on the construction of the agreement of the 27th of March 1860. Counsel for each party have argued that there are words in the instrument which would be rendered inoperative, or to which full effect could not be given, by adopting the construction contended for at the other side. Thus, plaintiff's Counsel rely on the words “*for one year certain*,” which they say would be of no value if it was held that the instrument created a tenancy from year to year. Defendant's Counsel, on the other hand, rely on the words “*in each and every year during the tenancy*” (which follows the statement of the quarterly days for paying the rent); and also on the word “*first*” (in the provision for allowance of repairs out of “the first four quarters' rent”); and they contend that those words would be rendered inoperative if plaintiff's construction of the instrument was adopted.

We have therefore to consider which construction would be the more reasonable and convenient one, and more in accordance with what, from the entire of the instrument, may fairly be inferred to have been the intentions of the parties. Plaintiff's Counsel contend that the words relied on by defendant should be considered as having been inserted in the instrument merely to provide for the contingency of defendant becoming a yearly tenant after the

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expiration of the first year, and to declare what the terms of such future tenancy should be; and that the entire instrument should be read as creating a tenancy only "*for one year certain*," and as declaring that if a further yearly tenancy should afterwards be created between the parties, it should be on the same terms, as to rent and gale days, as the tenancy for the first year. But according to plaintiff's construction, such further tenancy could only be created by some new agreement, to be entered into between the parties after the execution of the instrument: and it appears a forced construction of the instrument, to hold that the effect of these words was merely an agreement between the parties as to what should be the terms of a future contingent tenancy, which itself could only be created by a further agreement between the parties, in which further agreement, the terms would be more properly arranged or modified as the parties thought fit. The words relied on by defendant would be rendered perfectly useless, by holding that the instrument only created a tenancy for one year certain; as in such case, if after the expiration of that year, a yearly tenancy was created by implied agreement between the parties, from the tenants holding over, with the consent of the landlord, &c., such yearly tenancy would (even without the insertion of those words) be, upon the terms of the former tenancy, for one year.

It is more reasonable to hold that the yearly tenancy (which was in the contemplation of the parties) was actually created by the instrument which declared its terms, than to qualify the provisions of the instrument by making them contingent on the future creation of that tenancy. It is also to be observed that, if the instrument be capable of the construction contended for by defendant, it would certainly be more convenient to adopt it; as otherwise, at the end of the first year (if no act had been done in the interval either to create a new tenancy, or to show the intention of either party to determine the holding), the relation of the parties would be left in that state of uncertainty, the inconvenience of which had originally induced Courts of Law to substitute in many cases yearly tenancies for more uncertain

interests. The case of *Thompson v. Maberly* (a), which was cited in the argument, appears to support defendant's construction of the present agreement. That was an action for rent: the terms of the demise were "*for twelve months certain, and six months' notice afterwards.*" The tenant gave six months' notice, before the expiration of the first year, that he would quit at the end of that year, which he accordingly did, and insisted that he was not liable for any subsequent rent. Plaintiff contended that defendant was not at liberty to quit until six months' notice had been given after the expiration of the first year. Lord Ellenborough however held that the tenant was at liberty to quit at the end of that year, by having given such six months' notice. He stated that the word "*certain*" applied to the first "twelve months; showing that everything afterwards was uncertain, and "depended on the notice." The facts of that case are different from the present; but it is clear that the decision of Lord Ellenborough proceeded on the assumption that notwithstanding the terms of the demise were "*for twelve months certain,*" yet that by force of the subsequent words "*and six months' notice afterwards,*" an immediate tenancy from year to year was created, which would have continued for the second year, if not determined at the end of the first year, by the tenant or landlord serving notice for that purpose six months previously. In the case now before us it may in like manner be contended that, though in the first instance the letting is "*for one year certain,*" yet that by the subsequent words relied on by defendant, an immediate tenancy from year to year is created.

On these grounds I am of opinion that a verdict should be entered for the defendant, pursuant to the liberty reserved.

HAYES, J.

My opinion is favorable to the defendant. It is plain, from the language of the instrument, that the parties themselves contemplated a tenancy that might last beyond the first year; and provided for it expressly. It is also plain that any other construction would be

(a) *Ubi supra.*

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M. T. 1861. highly unreasonable. It would be inconvenient for both parties if we were to decide for the plaintiff. To be sure the plaintiff might find it very convenient to be able, at the end of the first year, to bring his action of ejectment without having served a notice to quit. But that right must be reciprocal; and it would generally be found exceedingly inconvenient to both parties; to the tenant if he were not to know whether the landlord meant to disturb him, and to the landlord if he were not to know whether the tenant meant to continue in his holding. The landlord would find it inconvenient to be left without a tenant, and the tenant to be left without a house. Therefore, upon these considerations, and acting upon the general principle that it is wise "*stare decisis*," I am of opinion that the construction in *Thompson v. Maberly* (a) is a reasonable construction to be put upon this contract.

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FITZGERALD, J., concurred.

(a) *Ubi supra*.

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*Common Pleas*

## NOLAN v. GUMLEY.

(*Common Pleas*).

Jan. 16, 29.

THIS was an application to set aside a certain judgment, obtained upon a warrant of attorney, signed by the defendant, upon the ground that the same had been obtained by fraud, while the defendant was a prisoner, in the custody of the Sheriff of the county of Dublin; and also on the ground that the warrant of attorney had not been executed, as required by the 93rd General Order of 1854.\* The assignee of the judgment, which had been registered as a mortgage against the defendant's lands, had filed a claim in the Landed Estates Court, in the matter of the defendant's estate, and the question of allowing the claim had stood over until this motion should be disposed of. The motion had stood over for the filing of affidavits on the part of the assignee of the judgment, in answer to those upon which the motion was grounded. The defendant's affidavit stated that Parker Molloy had obtained a judgment against

A defendant, being in custody, under execution on foot of a judgment, in consideration of his discharge, gave a bond and warrant to confess judgment for a larger amount, to a party who represented himself as the assignee of the former judgment. Judgment having been subsequently entered on foot of the bond and warrant, and registered as a mortgage against the de-

fendant's lands, an application was, several years afterwards, made to set aside the bond and warrant, as having been obtained from the defendant by fraudulent misrepresentation and under pressure of duress.—*Held*, that on the ground that there had been some consideration for the original judgment; that a long period had elapsed, during which both the judgment creditors had left the country; and that the party in whose name the present application was made had ceased to have any personal interest in the matter;—that the motion ought not to be granted.

Where the plaintiff dictated to the defendant, in custody, a letter, addressed to an attorney whom the defendant had never seen, requiring him to attend the next day, and witness the defendant's signature to a bond and warrant of attorney—*Held*, that the fact of the attorney not having been originally named by the defendant did not vitiate the execution of the instrument by the defendant, within the 93rd General Order 1854.

*Held also*, that an attestation clause, in this form, was valid:—"Signed, sealed, and delivered in the presence of Francis Carolan, attorney for the said T. G., 11 Talbot-street, Dublin, and subscribe my name as his attorney, and at his request."

\* 93rd Rule—"No such warrant, given by any person in custody of a Sheriff or other officer, shall be of any force, unless there be present some attorney on behalf of such person in custody, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant, before the execution thereof; which attorney shall subscribe his name as a witness thereto, and declare himself to be attorney for the defendant, and that he subscribes as such attorney."

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him, on foot of a bill of exchange, for £27, which was a renewal of another bill, for which he had only received £5, the residue having been paid to a person named Richardson; that deponent, on the 9th March 1854, was arrested on foot of said judgment; and that, in September 1855, while in Kilmainham Gaol, Nolan the plaintiff came to him, representing himself to be the assignee of the judgment, and promising to discharge defendant if he executed a bond and warrant for £43; that Nolan dictated to him a letter, to an attorney named Carolan, requiring Carolan to attend the next day to witness the execution of the bond. That on the following day Nolan attended, and also Carolan, whom the defendant had never seen before; that Carolan was nominated by Nolan, and did not explain to deponent the nature of the warrant; that, upon the statement that said judgment had been assigned, and no part of it had been paid, deponent executed the warrant. The defendant also deposed that he was discharged from custody in August 1856, and, in the course of that month, was casually informed by Hunter, for the first time, that Molloy's judgment had never been assigned to Nolan. Nolan's judgment had been assigned to Hunter, in consideration, as was alleged, of £15; but deponent did not believe that it had been paid. Both Nolan and Molloy had left the country. It was also stated that the deponent had no personal interest in the application, but had many *prisme* creditors, who were interested in setting aside the judgment. On the other hand, Hunter, the assignee of the judgment, made an affidavit, denying the alleged conversation with the defendant; and Carolan also deposed that it was not true that the purport of the warrant was never explained to the defendant at the time, and that the defendant knew the contents of it. The attestation was as follows:—  
 "Signed, sealed, and delivered in the presence of Francis Carolan, attorney for the said Thomas Francis Sadleir Gumley, 11 Talbot-street, Dublin, and subscribe my name as his attorney, and at his request."

*St. John Armstrong*, in support of the motion, contended, first, that the warrant was void, as having been obtained by misrepresen-

tation and undue pressure: *Hutson v. Hutson* (a). Secondly, the attorney who attended on behalf of the defendant was virtually nominated by the plaintiff: *Mason v. Riddle* (b); *Barnes v. Penderrey* (c); *Cooke v. Edwards* (d); *Hornsby v. Wilson* (e). Thirdly, the attestation is insufficient, within the 93rd General Rule 1854, for not stating expressly that the attesting witness was the defendant's attorney: *Hibbert v. Barton* (f); *Pocock v. Pickering* (g). The 1 & 2 Vic., c. 110, s. 9, in England corresponds with the 93rd Rule.

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*E. F. Litton* contra, contended, on the first part, that the lapse of time since the execution of the warrant was a bar to the present application. The defendant has admittedly no interest in the application. Both Parker Molloy and Nolan have left the country, and it is now too late to inquire into the consideration of the judgment. In the schedule filed in the Landed Estates Court, the judgment is not disputed on the ground of nullity. It is simply stated, in the opposite column, "Nothing due:" *Bligh v. Brewer* (h). With respect to the second part, it is not necessary that the attorney should have been originally named by the defendant: 2 *Ferguson's Practice*, p. 1145; *Taylor v. Nicholls* (i). Thirdly, that it is sufficiently averred that Carolan was the attorney of the defendant. The absence of an attorney on behalf of a defendant is an irregularity which can be waived: *Dobson v. M'Daid* (k).

*Armstrong*, in reply.

The defendant cannot waive, where the rule is founded on public policy: *Montgomery v. Byrne* (l). A statutable mortgagee is not a purchaser for value: *M'Auley v. Clarendon* (m); *Byre v. M'Dowell* (n).

*Cur. ad vult.*

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|------------------------------|------------------------------|
| (a) 7 T. R. 7.               | (b) 8 Dowl. P. C. 207.       |
| (c) 7 Dowl. P. C. 747.       | (d) 2 Dowl., N. S., 55.      |
| (e) 1 Ir. Jur., N. S., 204.  | (f) 10 M. & W. 678.          |
| (g) 16 Jur. 760.             | (h) 3 Dowl. P. C. 266.       |
| (i) 6 M. & W. 91.            | (k) 1 Ir. Com. Law Rep. 236. |
| (l) 2 Ir. Com. Law Rep. 230. | (m) 8 Ir. Chan. Rep. 568.    |
| (n) 7 Ir. Jur., N. S., 41.   |                              |

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MONAHAN, C. J.

In this case the defendant applied to set aside the judgment, and warrant of attorney in pursuance of which it was entered, on two grounds—first, that the bond and warrant were executed by him in consequence of false and fraudulent representations, made to him by the plaintiff Thomas C. Nolan; and, next, that the warrant of attorney was void, having been executed by him while in custody, without complying with the provisions of the 93rd General Order of 1854.

With respect to the first ground, the defendant has made an affidavit, in which he states that, in Hilary Term 1854, one Parker Molloy obtained a judgment against him, on foot of a bill of exchange for £22. 15s.; that he was arrested under a *ca. sa.*, on foot of that judgment, in March 1854; and that in September 1855, being still in custody, Mr. Thomas C. Nolan, who was attorney for Parker Molloy in the proceedings, called on him, and represented to him that Parker Molloy, previous to his leaving the country, had assigned to him the judgment so obtained against the defendant, and that if he would execute to him his bond and warrant of attorney, to secure the sum of £43, being the sum then due on foot of the judgment, that he would discharge him from custody; and that accordingly he executed the bond and warrant on foot of which the judgment in the present case was obtained; and was, some time after, discharged from custody, having been detained for some time under other executions. The time of his actual discharge was, I believe, early in 1856. He further states that, since his discharge, he has been informed that Parker Molloy had not assigned his judgment to Nolan, and that he was not able to find any such assignment; and he further states that, after his discharge, he was informed by one Richardson, who was in some way mixed up with the bill transactions with Parker Molloy, that he (Richardson) had paid a sum of £20 to Molloy on foot of three bills, for which he (Gumley) was entitled to credit against Molloy, and that Richardson produced to him Molloy's receipt for the sum so paid. No account is given for the non-production of this receipt, nor is there any affidavit from Richardson. In answer to this, an affidavit has

been made by Hunter, the party who is now entitled to the judgment obtained by Nolan, he (Nolan) having, in the month of August, in the year 1856, assigned same for full consideration to him, shortly previous to Nolan's departure from this country for Australia; and that Nolan at the time assured him that the full amount of the judgment was due. It also appears that Parker Molloy also left the country some time in 1854; so that no affidavit can now be obtained from either Molloy or Nolan. On this part of the case, we do not think we can comply with the defendant's application. If in fact he was entitled to credit against Molloy for any sum paid by Richardson, or for any other reason had any defence against Molloy's claim, or any part of it, he should have put forward such defence in the action brought against him by Molloy. And with respect to the allegation that Molloy's judgment was not assigned to Nolan, we must bear in mind that the judgment could not be legally assigned; and, for anything we know to the contrary, same may have been equitably assigned by Molloy to Nolan. No demand on foot of Molloy's judgment has been made against the defendant, nor his property, in the Landed Estates Court. If he had any ground for an application to the Court, he should have brought it forward while Nolan was in the country; and it is not to be forgotten that it is stated that the defendant is really not interested in the question, as his property has been sold in the Landed Estates Court, the proceeds of which are applicable to the payment of the present judgment, but will not pay all the subsequent creditors, who are the persons really interested in the present application.

On the whole therefore, we do not feel any difficulty in saying that no sufficient grounds have been laid for this part of the application.

The defendant however insists that there has not been a compliance with the provisions of the 93rd General Order; and that Mr. Carolan, the attorney who witnessed the warrant of attorney, was not the attorney of defendant, or nominated by him, as required by the Rule, which is in these words—[His Lordship read the Rule; see *ante* p. 301].

From the terms of the Rule it is clear that it requires two matters,

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quite distinct in their nature—first, that there shall in fact be present at the time of the execution of the warrant, an attorney on behalf of the party executing same; that such attorney shall be expressly named by the party so executing same; and that he shall attend as such attorney at his request, for the purpose of informing him of the nature and effect of such warrant. The second requisite, quite distinct from the former, is, that the attorney so present shall attest the execution of such warrant in a particular form, namely, he is to subscribe his name as a witness thereto, and declare himself to be attorney for the defendant, and that he subscribes as such attorney. The requisitions of the first part of the Rule are to be ascertained by affidavit, as any other disputed matter of fact; the latter part must depend on the words of the attestation. The defendant alleges that neither branch of the Rule has been complied with; he insists that Mr. Carolan, who witnessed his execution of the warrant, should not be considered as his attorney, or as having been nominated by him, and that he (Carolan) did not explain to him the nature of the security. What defendant states in his affidavit is, that Nolan, having called on him in the prison, the day before the execution of the warrant, and he having agreed to execute same, Nolan dictated a letter, which he wrote to Mr. Carolan, an attorney, requesting him to attend next day, to witness a bond he was about executing; that accordingly Carolan and Nolan came together to the prison on the following day; that he had never previously seen Carolan, who never before or since acted as his attorney; that Carolan did not explain to him the nature of the securities; and that, having executed the bond and warrant, which was attested by Carolan, Nolan handed him Carolan's fee, which he thereupon paid to the said Carolan. It is to be observed that Mr. Gumley does not state that he was ignorant of the nature of the securities he was executing, but merely that Carolan did not explain to him the nature thereof.

Mr. Carolan, in his affidavit, states that having received defendant's letter, he, in pursuance thereof, attended at the prison, and that he asked the defendant whether he understood the nature of the security he was about to execute, and whether he owed Nolan

the amount thereof; to which the defendant replied that he did; and that he nominated him as his attorney, to witness the execution thereof, and requested him to act in that capacity; and that he accordingly, as such attorney, witnessed the execution of the bond and warrant.

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The question is, in this state of facts, was Carolan the attorney of the defendant, expressly named by him, and did he attend at his request, to inform him of the nature and effect of the warrant? The Rule does not say that the attorney shall in fact inform him; and it never could be contended that if, without any suggestion or act of the plaintiff, the defendant had his own attorney in attendance, that the execution of the warrant would be void, by reason of his own attorney not informing him of the nature of the security, though in fact he was himself as well aware thereof as the attorney. The question therefore is, was Carolan Gumley's attorney, expressly named by him, and attending at his request?

Defendant's Counsel has referred to *Cooke v. Edwards* (a). In that case it was decided that though the plaintiff's attorney was the general attorney of the defendant, usually employed by him, though he acted as defendant's attorney on the occasion of the execution of the cognovit at his express request, that it was not in compliance with the statute in force in England, which is in terms the same as our Rule; the Court holding that the attorney for the defendant must be a different person from the plaintiff's attorney. Defendant's Counsel also referred to the case of *Mason v. Riddle* (b), in which plaintiff's attorney, having sent the cognovit to Shaftesbury, where defendant resided, to his the attorney's agent, to have it executed by the defendant, and the agent having explained to the defendant the necessity of his naming an attorney to witness it, the defendant said, "Then, I name you"—the Court held the cognovit void, and that neither the plaintiff's attorney, or his agent or person acting for him, could be the defendant's attorney; that he should be a person distinct and different from the plaintiff's attorney or his agent. These cases certainly have no application to the present. It is not alleged

(a) 2 Dowl. P. C., N. S., 55.

(b) 8 Dowl. P. C. 207.

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We have also been referred to *Barnes v. Pendrey* (a) as an authority that Mr. Carolan, under the circumstances stated in the defendant's affidavit, cannot be considered as expressly named by him. In that case the defendant, being about to execute a cognovit, was asked by the plaintiff's attorney whether he had any attorney whom he wished to act for him. He said not; and requested plaintiff's attorney should send for some one to act for him. Plaintiff's attorney told his clerk to prepare the cognovit, and get some attorney to act for the defendant; the clerk prepared the cognovit, and brought with him an attorney to act for the defendant; and in the margin of the cognovit the defendant inserted a written request requiring the attorney so brought to act for him, who did so, and explained fully to him the nature of the cognovit: yet the Court held the Rule had not been complied with; stating that an attorney having been brought in by plaintiff's attorney's clerk, his name not having been previously mentioned, could not be considered as named by the defendant. But whether in this case the Court came to a right conclusion or not, they professed not to question the propriety or authority of the cases which decided that the fact of plaintiff's attorney having suggested to the defendant the name of an attorney, who was approved of by him, did not prevent the attorney so circumstanced being considered as expressly named by the defendant: this was decided in the case of *Bligh v. Brewer* (b). Defendant, being arrested, was brought to the office of plaintiff, who was himself an attorney, defendant's own general attorney being present; but, there being some question as to whether defendant would defend the action or give a cognovit, defendant's attorney went away, having occasion to go to the country; in some time after defendant agreed to give a cognovit, and plaintiff's clerk informed him it was necessary to have an attorney to attend on his behalf, and that he had just seen a Mr. Cummins, an attorney, who would attend, if he had no objection; to which defendant replied, he did not much care who it was: the clerk

(a) 7 Dowl., P. C., 74.

(b) 1 C. M. & R. 651.

then arranged with Cummins that they would call at his office, which they did, and Cummins asked defendant if he wished him to attest the execution of the cognovit, as his attorney; to which defendant replied that he did: and prevented him reading it to him, as he was already aware of its contents. Parke, B., there says:—"The Rule requires three distinct things; first, that there shall be an attorney attending on behalf of the person in custody; secondly, that he shall be a different person from the plaintiff's attorney; and, thirdly, that he shall be expressly named by the defendant, and attend at his request. The Rule requires the attorney to be expressly named by the person in custody." It seems to me that this case comes within these words; for it comes to the same thing whether the defendant states affirmatively that he adopts him as his attorney, or says in the first instance "I wish you to be my attorney;" the arrangement of the words cannot make any difference.

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There is a more recent case, *Taylor v. Nicholls (a)*, to the same effect. In that case the plaintiffs, who were the trustees of the defendant's marriage settlement, had allowed him to take into his hands some of the trust funds, which they subsequently required him either to replace or give security for. An interview in consequence took place between the defendant and Messrs. Alexander of Halifax, the attorneys of the trustees, and the defendant, on the following day, called at their office and agreed to execute a warrant of attorney to the plaintiffs for the sum of £1200. One of the Messrs. Alexander prepared the warrant, and read it over to the defendant, and told him that it was necessary that some attorney should be present on his behalf, to attest the execution of it by him, and required whom he would wish for that purpose. The defendant replied that he had no wish to have any particular attorney; but that his only anxiety was that the transaction might not become known. Mr. Alexander thereupon mentioned the name of a Mr. Crossley of Halifax. The defendant immediately assented, and went, accompanied by Mr. Alexander's clerk, to Mr. Crossley's office. On their arrival there,

(a) 6 M. & W. 91.

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the warrant of attorney was produced; Crossley took it into his hands, and asked the defendant if he wished him to attest it on his behalf: the defendant replied that he did. Crossley asked him if it had been read over to him and if he understood it: the defendant replied that it had been read over to him by Mr. Alexander, and that he fully understood it. It was then executed by the defendant, and attested by Crossley as his attorney, in the terms of the statute. Judgment was afterwards entered up, and execution sued out on it. The defendant in his affidavit stated that, when he executed the instrument, he had no knowledge of Crossley and had never seen him before, and did not know whether in fact he was an attorney or not; and that he understood at the time of signing the warrant of attorney that it would not be enforced against him. Parke, B., says:—"The question turns entirely on "the construction to be put upon the statute 1 & 2 Vic., c. 110, "s. 9, which I apprehend must be construed according to the "ordinary meaning of the words employed in it, unless such a "construction leads to some practical absurdity or contrariety. "We are to construe the words as we find them—adding nothing "to them—deducting nothing from them. The attesting attorney "therefore 'must' be expressly named by the defendant. But "we cannot therefore suppose that it was intended that the defend- "ant must expressly pronounce at length the christian and surname "of the attorney; but he must be expressly named by him, in "contradistinction to his being impliedly named or adopted. There "is not a word to lead to the conclusion that he must be originally "or spontaneously named by the party, or to exclude the sugges- "tion of a name by a third person."

There are no words in the Act of Parliament which make it necessary that the defendant should fully know what is the legal effect of the warrant of attorney; and although he did not fully understand that it would be put in force against him immediately, it is not therefore void. We must see how this case applies to the present. No doubt it appears that the attorney in question was suggested to the defendant, and that the latter was not acquainted with him; but it cannot be considered more than a mere adoption

of a person by the defendant; and he was at liberty to do that; and he did it in the most effectual manner, by writing a letter to the attorney, requesting him to attend on his behalf to witness the execution of the warrant of attorney: on the next day, Mr. Gumley does not say that he did not know the nature of the warrant; but merely that the attorney did not explain it to him. The affidavit of Carolan, however, states that he asked the defendant, previously to his executing the bond and warrant, if he understood the nature of the document he was about to execute, and if he truly owed the amount of the consideration mentioned therein to the plaintiff; and the defendant replied that he did, and nominated him as his attorney for the occasion, and requested him act in such capacity. We are of opinion therefore, there having been no fraud on the part of Carolan, and no allegation that he was in any way connected with Nolan (however we may be satisfied that he was originally suggested to the defendant by Nolan), that this portion of the case comes within the principle and reason of the cases to which we have been referred, and was a compliance with the terms of the Rule. But there still remains the question, whether this is a proper attestation within the terms of the Rule? The attestation here is in these terms, "Signed, sealed and delivered in the presence of Francis Carolan, attorney for the said Thomas Francis Sadlier Gumley, 11 Talbot-street, Dublin, and subscribe my name as his attorney and at his request." The effect of that is, "I am attorney for the defendant, and have subscribed my name as such at his request." The question is, what is the objection to that? The Rule runs thus—[His Lordship read it].—He is accordingly to subscribe his name as a witness, and declare himself to be the attorney for the defendant, and, that he so subscribes as such attorney. In the case on which defendant's Counsel chiefly relied, *Hibbert v. Barton* (a), the words of the attestation were—"Witnessed by me, William Pemberton, as the attorney of the said William Barton, attending at the execution hereof at his request, and expressly named by him." The Court held that it was not sufficient, because it was not distinctly stated in the attestation that William Pemberton was the attorney of Wil-

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liam Barton; and that stating it was witnessed by him as attorney of Barton was not equivalent. This, which is certainly a strong case, has been, I may say, followed by the majority of the Court of Queen's Bench, in the case of *Pocock v. Pickering* (a), in which case the attestation was—"Signed, sealed and delivered in the presence of me, Henry Clarke, who at the request and in the presence of the said M. Brooke, J. C., and J. P., have set and subscribed my name as the attorney on their behalf attesting the execution thereof, having first read over and explained to them and each of them the nature and contents thereof." Having already occupied so much time in the delivery of this judgment, I do not wish to read at length the judgments of Lord Campbell and other Members of the Court. It is enough to say that the Lord Chief Justice and Mr. Justice Coleridge were of opinion that it was not stated with sufficient distinctness in the attestation, that Henry Clarke was in fact the attorney of the parties executing same; that he did not thereby declare himself their attorney; and that he subscribed as such. While, on the contrary, Mr. Justice Erle was of opinion that the fair effect of what was stated in the attestation was, that Clarke was the attorney of the parties executing, and that he attested as such attorney. If in the present case the attestation was in the form in either of the two cases to which I have referred, we possibly might feel ourselves bound by their authority; though I confess that personally I feel very great difficulty in understanding how, consistently with what is stated in the attestation, the attorney attesting was not the attorney of the executing parties: but, be this as it may, these cases do not apply to the case before us; they were decided on the ground that it was not expressly stated that the attorney was the attorney of the party: whereas in the case before us the statement is, that it is executed in the presence of Francis Carolan, attorney for the said Gumley, and that he subscribes his name at his request. The Rule here does not give any form of attestation; it merely requires that in it the witness shall declare himself to be the attorney of the defendant, and that he subscribes as such attorney. No case

(a) 18 Q. B., N. S., 789.

has decided that an attestation following the very words of the Rule is not sufficient. No doubt, in several cases, attestations have been more full; and the Courts have approved of attestations recording the facts required by the earlier part of the Rule, as, that he was expressly named by the defendant, and attended at his request, and had read the document and explained it to the party: but, as I have already stated, it is not possible to hold that an attestation in the words of the Rule is not sufficient; nor is there an absence of authority in support of this view of the case. *Gay v. Wall* (a) is expressly in point. The attestation in that case was as follows—"Signed, sealed and delivered by "the said Henry Wall, in my presence; and I declare myself "to be the attorney for the said Henry Wall, and that I sub- "scribe as such attorney." In that case it was objected that the attestation did not state that he was named by the party, or attended at his request, or informed him of the effect of the document. On the other hand, it was contended that the attestation used the very words mentioned in the statute, and that more could not be required. This view was adopted by the Court, and Patteson, J., in giving judgment, says:—"No case has been "cited, nor have I been able to find any, in which it has been "held necessary that such statements (as presented by defendant's "Counsel) should be inserted in the attestation, although in some "of the cases the Court seems to have approved of their insertion. "On looking at the words of the Act, they only require that "the attorney should subscribe his name as a witness to the due "execution thereof, and thereby declare himself to be attorney "for the person executing the same, and state that he subscribes "as such attorney; and I think that I am bound by these words, "and ought not to exact that more should be stated than the "Act itself requires. I am therefore of opinion that the attes- "tation in this case is sufficient." So, in the case before us, we are of opinion that in the attestation the witness Carolan states that he is the attorney of the defendant Gumley; and that he

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On the whole therefore we are of opinion that the defendant's motion must be refused.

EYRE v. M'DOWELL, Official Manager of the  
 Tipperary Joint-stock Bank.

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 April 17, 18.  
 May 8.

Where, in an action against the acceptor of a bill of exchange, purporting to be accepted "*Per pro.* the Tipperary Joint-stock Bank, W. K. manager," upon the issue raised upon a traverse of the acceptance, W. K., being called as a witness, was asked, on the part of the plaintiff, whether it was part of his business, as manager, to accept bills of exchange for the said Bank? which was objected to by the defendant—*Held*, that the question was admissible.

An entry, contained in a book belonging to the Bank, purporting to be a copy of a circular informing the customers of the Bank that W. K. had been appointed manager, and had been empowered to sign all documents and indorse all bills on account of the Bank, was admitted at the time as secondary evidence, on the part of the plaintiff, of the issuing of the original circular.—*Held*, that in the absence of evidence of the sending of the original to the customers of the Bank, that the evidence was inadmissible.

The defendant's Counsel proposed to ask the manager of another Bank whether the bill of exchange sued on was one which, in the ordinary course of business, a Bank, according to banking usages, would accept for an inland customer?—*Held*, that the question was proper.

He also proposed to ask same witness whether a bill, accepted in the same way as the present, would, according to the course of trade and bankers, put a party upon inquiry as to the authority of an acceptance?—*Held*, that the question was proper.

He also proposed to ask the same witness whether authority to indorse was authority to accept?—*Held*, that the question was inadmissible.

The Judge having told the jury that, if they believed that K., as manager of the Bank, signed the bill by direction of J. S., and that J. S. was a director at the time, the acceptance was binding on the Bank—*Held*, that having regard to the fact that the bill was accepted *per procuration*, and that the deed of partnership required three directors to form a Court, and empowered the Court of Directors to make regulations respecting the accepting of bills, that the direction was wrong.

The fact of the knowledge, by the solicitor of a *bona fide* holder, but who has not acted for him in the particular matter, that a bill had been fraudulently accepted, is not evidence that the holder had notice of the fraud at the time of the indorsement.

£17,000, payable six months after date, drawn by John Sadleir, accepted "*Per pro.* the Tipperary Joint-stock Bank, William Kelly manager," and indorsed to the plaintiff.

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The defendant traversed the acceptance; and also pleaded that the said Banking Company was induced to accept the said bill through the fraud of the said John Sadleir; and that the plaintiff had notice of the said fraud when the said bill was first indorsed to himself by the said John Sadleir.

The cause was tried at the Sittings after Trinity Term 1862, before KROGH, J., when a verdict was found for the plaintiff, subject to a bill of exceptions tendered by the defendant.

William Kelly was examined, on the part of the plaintiff, and deposed that James Sadleir acted as director of the Tipperary Joint-stock Bank, in and previous to May 1855; that no other person acted as director; and he the said James Sadleir so acted from thence until the Bank suspended payment in February 1856; that the name and handwriting in the acceptance of the said bill of exchange was his William Kelly's name and handwriting; that at the time he accepted said bill he the said William Kelly was manager of the said Bank; and thereupon the Counsel for the plaintiff proposed to ask was it part of the said witness's business, as such manager, to accept bills of exchange for the said Bank; whereupon the Counsel for the defendant interposed, and insisted that the said question was not admissible to prove the authority of the said witness to accept bills for the said Bank; but the learned Judge held that the said evidence, so offered, was admissible in law; whereupon the said question was put to the said witness, who answered the same in the affirmative, and deposed that it was part of his business as manager, as aforesaid, to accept bills of exchange for the said Bank. This was the first exception.

William Kelly further deposed that he accepted the said bill of exchange in pursuance of a letter in writing from said James Sadleir to said witness, bearing date the 24th day of November 1855, and which letter was, by consent, made part of the bill of exceptions. He further deposed that a certain book, which was produced at the said trial, was one of the books of the said Bank,

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kept at the office of the said Bank at Clonmel, and containing, amongst others, an entry in the words and figures following :—

"1853. I beg to inform you that Mr. William Kelly has been appointed manager here, and has been empowered to sign all documents and indorse all bills on account of this Bank. I inclose specimen of his signature."

It was admitted, on both sides, that notice to produce the original circular letter, of which said entry was a copy, was duly served on defendant's attorney in this action, before the trial, and said entry was tendered in evidence by the Counsel for the plaintiff; which evidence the defendant objected to. The Judge admitted the evidence to be received accordingly; thereupon the defendant took his second exception.

Kelly further deposed that the printed words in the acceptance of the said bill of exchange—that is to say, the words "*Per pro.* Tipperary Joint-stock Bank," were stamped with the stamp of the said Bank.

Kelly was cross-examined by the Counsel for the defendant, and deposed that he was appointed in the month of March 1853; that he knew certain bank-books produced to him; that there was nothing further in the books than the extract read, authorising him to accept bills; that he (witness) saw the said circular letter, of which the entry aforesaid was a copy, on the day on which same was issued; that witness could not say when he saw the copy of said circular, written in red ink in one of the bank-books produced to witness; that witness could not say he saw said entry in red ink in the years 1855, 1856, 1857, or 1858; that witness could not say whether or not he ever signed his name on a blank stamp as acceptor of a bill; that he could not say whether or not his acceptance of the bill sued on was written on a blank stamp; that the drawer may not have signed it at the time; that he (witness) would not swear it was not altogether blank; that he thought it was not; that when the said letter of the 24th of November 1855 was written, said James Sadleir was in London and the witness was in Clonmel; that he (witness) believed that the bill was not drawn by John Sadleir at the time when the bill was accepted; that

witness's authority was from the said James Sadleir to send it to the said John Sadleir; that he (witness) could not find any authority, signed by three directors, to him, to sign bills; that witness never knew of three directors of said bank; that he (witness) was nominated by James Sadleir as manager, at £200 a-year; that he (witness) considered he had authority to accept bills; that he accepted bills for the said Tipperary Bank; that said John Sadleir owed £200,000 to the said bank when the said bank stopped payment; that his liabilities to the said bank at the date of the said bill were over £200,000; that witness knew Messrs. Morrogh and Kennedy; that the said Morrogh & Kennedy were the solicitors of the said bank, and understood its affairs perfectly; that Mr. M'Donnell was the bookkeeper at said Morrogh & Kennedy's, and the books showing the state of the said John Sadleir's account with the said bank were at their office; that the said Morrogh & Kennedy were the attorneys for the plaintiff, and for the said John Sadleir also; that said James Sadleir was the managing man; that he (witness) knew that the bill was an accommodation bill; that a bill was discounted in the Tipperary Bank for £21,000, purporting to be signed by the plaintiff, and due 5th May 1855, and that a credit was sent up to Morrogh & Kennedy for the amount; that the seven cheques produced were signed by John Sadleir; that the body of some of them was in the handwriting of said Morrogh, and others in the handwriting of said M'Donnell; that witness, in some instances, sent the money first, and got the cheques afterwards. In the course of the cross-examination of the said William Kelly, the deed of settlement of the said bank was produced by the defendant, and admitted by the Counsel for the plaintiff; and a copy of the said deed of settlement was, by consent of the parties in the cause, to be read as portion of this bill of exceptions.

At the close of the plaintiff's case, the Counsel for the defendant required the learned Judge to direct a verdict for the defendant, on the grounds that an acceptance of the said bill by the said bank was not proved; but the learned Judge refused to do so, and ruled that there was evidence in support of the issue, on which the jury might find that the said William Kelly had authority to accept bills for

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The defendant thereupon proceeded to give evidence in support of the issues raised upon the defences, and produced and examined as a witness James M'Donnell, who deposed that he knew Messrs. Morrogh & Kennedy ; that said Morrogh & Kennedy carried on business as solicitors ; that witness had no connection with them for the last two years ; witness had been in the employment of said Morrogh & Kennedy, but previously was in the employment of John Sadleir, and was in John Sadleir's employment in the month of March 1854, and was in such employment until 1856, and entered into the employment of Morrogh & Kennedy in April 1856, and continued in such employment for two subsequent years ; that witness had a private office in Morrogh & Kennedy's house ; that said Morrogh & Kennedy had access to it ; that a book, produced to witness, was kept by him at the said office of Morrogh & Kennedy, when he (witness) was in said John Sadleir's employment, and that said Morrogh & Kennedy had access to said book. Witness proved seven cheques to be signed by John Sadleir, and that they were all filled by said witness. The system was, that a letter would come from the Tipperary Bank, and he (Mr. Morrogh) would hand it to witness, and he (witness) would fill up the cheques ; that then he would hand them to Mr. Morrogh, and that was the course of dealing ; that the seven cheques then produced to him were all in 1854, and signed by John Sadleir : which the defendant gave in evidence. That the said Tipperary Bank ceased sending accounts on the 28th February 1855 : and that on that day John Sadleir owed £150,000 to said bank.

Defendant also produced, and examined as a witness, Robert Murray, manager of the Provincial Bank, to whom the bill of exchange in the writ of summons and plaint in this action mentioned was handed, and he was asked whether it was, in the ordinary course of business, a bill that a bank, according to banking usages, would accept for an inland customer ; to which question the Counsel for the plaintiff objected ; and, the defendant's Counsel insisting upon the admissibility of such evidence, the learned Judge refused to admit

such evidence, and decided that same was not admissible : to which ruling the defendant took the fourth exception. E. T. 1863.  
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Counsel for the defendant then proposed to ask said Robert Murray, would a bill so accepted, according to the course of trade and bankers, put a party upon inquiry as to the authority for acceptance ; to which question Counsel for the plaintiff objected ; and, Counsel for the defendant insisting upon the admissibility of such evidence, the learned Judge, at Nisi Prius, refused to admit such evidence, and ruled that same was not admissible : the defendant thereupon took the fifth exception. BYRE  
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Counsel for the defendant further proposed to ask said witness, whether authority to indorse was authority to accept ; to which plaintiff's Counsel objected ; and, Counsel for the defendant insisting on the admissibility of such evidence, the learned Judge refused to admit same, and ruled that said evidence was not admissible : to which ruling the defendant took the sixth exception.

Defendant then gave and read in evidence the deed of incorporation of said Tipperary Joint-stock Banking Company, bearing date the 5th day of July 1842, containing, amongst others, the following provisions, that is to say, Clause 43 :—" That three directors "shall be necessary to constitute an ordinary, and five to constitute "a special Court of Directors : " and, Clause 92 :—" That the Court "of Directors shall make all such regulations and rules, and give "to the secretary or other person or persons in the employment of "the society all such powers, not inconsistent with any of the provisions contained in these presents, with regard to the drawing, "indorsing, or accepting of bills, the signing of receipts, and the "lending or otherwise disposing of the funds or property of the "society ; and all such other powers generally in regard to the funds "or property of the society, and the management of the business "thereof, as the Court of Directors shall in their discretion think "proper ; subject however to the control of a general meeting."

There was then read in evidence the following letter of the said John Sadleir, bearing date the 28th November 1855 :—

" 28th November '55, London.

" DEAR SIR—The bill of 26th instant, for £17,000, and accepted

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There was also read in evidence a written agreement, bearing date the 13th day of May 1855, and certain deeds, bearing date respectively the 1st day of August 1855, and the 18th day of March 1854; said agreement and said last mentioned deeds, and a printed copy of said deed of copartnership, to be taken as incorporated with the bill of exceptions: and thereupon, and after it was admitted on both sides, that it did not appear upon full search in the books, that there had been any Court of Directors acting at all, the defendant closed his case. Thereupon Counsel for the plaintiff called upon and required the learned Judge to direct the jury to find for the plaintiff on all the issues: and Counsel for the defendant asked the learned Judge to submit the question of authority to accept, to the jury; to which Counsel for the plaintiff objected: and the learned Judge told the jury that if they believed that the said William Kelly, as the manager of the said Tipperary Bank, signed the said bill of exchange in the writ of summons and plaint in this action mentioned, by direction of the said James Sadleir, and that the said James Sadleir was at the time director of the Bank, they should find for the plaintiff on the first issue, and that there was no evidence for the defendant on the other issues. To which direction of the learned Judge the defendant took his seventh exception.

Counsel for the defendant then called upon the learned Judge to leave as a question for the consideration of the jury, whether the bill sued on was accepted in fraud of the said Banking Company, and whether the said plaintiff, through his solicitors Messrs. Leonard Morrogh and James Barron Kennedy, had knowledge of all the circumstances connected with the acceptance of the said bill, and the relations, and the state of the account between the said John Sadleir and said Banking Company, from which the jury might infer that the acceptance of the said bill was fraudulent, and procured by fraud; but his Lordship refused to leave said question to the jury, and directed the jury that there was no evidence of fraud in the acceptance of said bill, and that the jury

should find for the plaintiff on the several issues alleging fraud and knowledge of the fraud by the plaintiff: to which direction the defendant took his eighth exception.\*

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\* The defendant relied upon the following points on argument:—

First—That the evidence of William Kelly, that it was part of his business as manager, was not legally admissible; inasmuch as the authority of said William Kelly should be proved by some act of the directors of said Banking Company.

Secondly—That the copy of a circular letter, contained in the bank book, was not admissible; inasmuch as no evidence was given that such circular had been communicated to bankers or traders, or in any other way published; and inasmuch as, even if legal evidence of the issue of said circular had been given, said circular furnished no evidence of authority to said William Kelly to accept bills for said Banking Company.

Thirdly—That the learned Judge should, at the close of the plaintiff's case, have directed the jury that there was no evidence of authority in William Kelly to accept for the bank the bill sued on, and should have directed a verdict for the defendant; inasmuch as the circular letter necessarily excluded any authority in William Kelly to accept; and further, inasmuch as it appeared, in point of fact, that no Court of Directors had ever been held; and that, under the deed of incorporation of said Banking Company, which was given in evidence by the plaintiff, such an authority could only be conferred by a Court of Directors; and said William Kelly never was, in fact, duly authorised to accept bills for said Banking Company; and that the form of acceptance of the bill sued on "*Per pro*. the Tipperary Joint-stock Bank," would put an indorser on inquiry as to the authority of the person assuming to accept for the Company.

Fourthly—That the evidence as to the usage of trade and custom of bankers as to accepting inland bills of exchange was legal evidence; and the learned Judge was in error in refusing to admit such evidence, inasmuch as it was a material subject of inquiry, whether the bill sued on was of such a character as to put an indorsee on inquiry as to its validity, and the authority of the parties to said bill; and for the same reason, that the fifth and sixth exceptions should be allowed.

Fifthly—That the learned Judge was in error in his direction to the jury, on the question of the authority of William Kelly to accept for the said bank; forasmuch as the question of authority should have been left to the jury generally; and that the learned Judge misdirected the jury as to what facts were conclusive evidence of authority, and misdirected the jury as to the evidence which would establish such facts.

Sixthly—That the learned Judge was in error in ruling that there was no evidence of fraud in the acceptance of said bill, or of knowledge thereof in the plaintiff, inasmuch as it appeared that such bill was so accepted at a time when the drawer thereof was indebted to the said bank in a sum of about £150,000, and said bill appeared, from the letters of the said John Sadleir, to have been accepted in blank, and to have been so accepted by William Kelly, by direction of James Sadleir, and was accepted without consideration, and that the above facts were known to the plaintiff, through his solicitors Messrs. Morrough and Kennedy, who were at the same time solicitors for the said plaintiff and the said Banking Company.



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*M'Kenna and Whiteside*, in support of the exceptions.*J. B. Murphy* and Serjeant *Armstrong*, contra, in support of the verdict.

The following cases were cited during the argument:—*Attwood v. Munnings* (a); *Alexander v. Mackenzie* (b); *Stagg v. Elliot* (c); *Bramah v. Roberts* (d); *Brown v. Byers* (e); *Kirke v. Bell* (f); *Balfour v. Ernest* (g); *Ernest v. Nichols* (h); *Thompeon v. Bell* (i); *Forbes v. Marshall* (k); *Royal British Bank v. Turquand* (l); *Gordon v. Sea Fire Life Assurance Society* (m); *Bank of Australasia v. Brellat* (n); *Brandao v. Barnett* (o); *Barnes v. Pennell* (p); *Prince of Wales Assurance Company v. Harding* (q); *In re Burmester* (r); *Smith v. The Hull Glass Company* (s); *Dickenson v. Valpy* (t); 1 *Lindley on Partnership*, pp. 192-3; 1 *Selwyn's N. P.*, p. 359.

*Cur. ad. vult.*

MONAHAN, C. J.

May 8.

This case comes before the Court on a bill of exceptions. The action was tried during the Sittings after last Term, and was brought by Mr. Eyre, as the indorsee of a bill of exchange for £17,000, dated the 26th of November 1855, and payable six months after date, drawn by Mr. John Sadleir on, and accepted by, the Tipperary Joint-stock Banking Company, by William Kelly "*per procuration*." The bill was made payable at the London and County Bank. It appears on the face of the document that it was accepted "*per procuration*," by William Kelly, for the Tipperary

(a) 7 B. &amp; C. 278.

(c) 12 C. B., N. S., 373.

(e) 16 M. &amp; W. 252.

(g) 5 C. B., N. S., 601.

(i) 10 Exch. 10.

(l) 6 El. &amp; Bl. 327.

(n) 6 Moo., P. C., 173.

(p) 2 H. of L. Cas. 528.

(r) 9 Ir. Chan. Rep. 84.

(b) 7 B. &amp; C. 283.

(d) 3 Bing., N. C., 963.

(f) 16 Q. B. 290.

(h) 6 H. L., N. S., 401.

(j) 11 Exch. 166.

(m) 1 H. &amp; N. 599.

(o) 12 Cl. &amp; Fin. 787.

(q) 9 El. &amp; Bl. 183.

(s) 8 C. B. 668; S. C., 11 C. B. 697.

(t) 10 B. &amp; C. 128.

Joint-stock Banking Company, and it purports to be indorsed by John Sadleir. Mr. Eyre's title is as indorsee of that bill of exchange, and he sued Mr. M'Dowell as the official manager, under the Joint-stock Company's Winding-up Acts, of the estate of the Tipperary Joint-stock Banking Company. The pleas, on which issue was taken, and on which the plaintiff went to trial, were, that the bank did not accept the bill, and that the acceptance of it was obtained by the fraud of John Sadleir: and that the plaintiff Mr. Eyre had notice of the fraud when the bill was indorsed to him by John Sadleir. On these two pleas the issues were, first, did the Tipperary Joint-Stock Bank accept the bill in question? Secondly, was the other defence true in substance and fact? The first witness examined on the part of the plaintiff was William Kelly, the person by whom the bill of exchange was accepted on behalf of the Banking Company. He deposed that James Sadleir acted as director of the bank, in and previous to the month of May 1855,—that was six months before the acceptance of the bill; that no other person acted as director; and that James Sadleir so acted until the bank suspended payment in February 1856; that the name and handwriting of the acceptance of the bill was the witness's; and that at the time of its acceptance he was the manager of the bank. Counsel for the plaintiff then proposed to ask him, was it part of his business as such manager to accept bills of exchange for the bank? Counsel for the defendant objected to the question, on the ground that it was not competent for the plaintiff in this way to prove Kelly's authority to accept bills of exchange on behalf of the bank. The learned Judge held that the question was a proper one; and the witness, in answer thereto, stated it was part of his business as manager to accept bills of exchange of the bank. The first exception raises the question as to the admissibility of this evidence. The objection made to the question was, that it was asking the witness whether in point of law he had authority to accept bills of exchange on behalf of the bank; and no doubt if that were the true meaning of the question, it would have been objectionable; because he ought to have been asked what the authority was, which he had? and it would then

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have been for the Court to judge of its sufficiency. But it occurs to us that such was not the meaning of the question—that its meaning simply was, whether it was part of the ordinary business which he discharged as manager, to accept bills of exchange for the bank; leaving it afterwards to be decided, by other evidence in the case, whether the fact of its being a portion of his ordinary business as manager, to accept bills, was, with other evidence that might be given, sufficient evidence of authority to him to accept. And we think that the Counsel for the defendant had no right to assume that the evidence was given for the purpose of proving authority, for there is nothing better settled than this; that if a question is legitimate, and can be legitimately put, or evidence can be legitimately given for any purpose, its admissibility cannot be objected to. If it should be apprehended that the Judge will afterwards make an improper use of the evidence given,—as for instance, if the Judge were to rule that because it was Mr. Kelly's business to accept, therefore he had authority to accept,—it would be a ground of objection, not to the reception of the evidence, but to the use made of it by the Judge, which would amount to misdirection. We are of opinion that the fact of it being part of Mr. Kelly's business, in fact, transacted by him, to accept bills for the bank, was properly receivable in evidence, and therefore that the first exception must be overruled.

The next exception arose in this way: Mr. Kelly then gave evidence of what his actual authority was, and he deposed that he accepted the bill of exchange in pursuance of a letter from James Sadleir, bearing date the 24th of November 1855. That letter is made part of the bill of exceptions. William Kelly further deposed that a certain book which was produced at the trial, was one of the books of the bank, kept at the office at Clonmel; and he pointed out in said book an entry, purporting to be a copy of a letter, in the following words:—"1853. I beg to inform you "that Mr. William Kelly has been appointed manager here, and "has been empowered to sign all documents, and indorse all bills "on account of this bank. I inclose a specimen of his signature." The question was, whether that entry could be given in evidence?

It appeared from a memorandum opposite the entry, that the letter of which it was a copy had been sent to Mr. Gurney and other London bankers. Notice to produce the original, of which that was a copy, had been served on the defendant's attorney, but no evidence was given, by whom or by whose directions this letter was written, or by whom signed, or that in fact it had been forwarded to the London bankers, the entry to that effect not having been tendered in evidence. But supposing such evidence had been given, this entry was merely secondary evidence of an original document, to produce which no effort was made; the original, being it is to be presumed, in the hands of the London bankers; nor was the loss of it suggested. This exception is not very material on the merits of the case, but we must go through them in detail. Our opinion is, that this document, which at most is only a copy of the document, which would be evidence against the bank (if it was properly signed and sent out as the authority of Kelly), was not rightly admitted; and therefore we are of opinion that this exception should be allowed.

Mr. Kelly further said that there was no further authority in the books to accept bills, or anything in fact except the extract already stated, and the letter from James Sadleir. On cross-examination he said that he could not say whether he accepted that bill on a blank stamp; and, that for anything he knew to the contrary, that John Sadleir, the drawer of the bill, might not have signed the bill at all, at the time he accepted it; he said that James Sadleir was in London, and he was in Clonmel when he received the letter on the 24th of November. He then stated that he had no authority from three directors to accept bills; that he was appointed manager by James Sadleir, at a salary of £200 a-year, and that he considered he had authority to accept bills, and that he did accept bills for the bank. He said that John Sadleir owed the bank, when it stopped payment, about £200,000; that John Sadleir's liabilities to the bank, when he drew the bill, or at the date of it, were over £200,000; that he knew Messrs. Morrough & Kennedy; that they were attorneys for the plaintiff and also for John Sadleir; that James Sadleir was the managing man of the bank; that he

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**M'DOWELL.** knew the bill was an accommodation bill ; that a bill was discounted in the Tipperary Bank for £21,000 purporting to be signed by the plaintiff, and to be due on May 5th, and that a credit was sent up for the amount to Messrs. Morrough & Kennedy ; and he proved seven cheques. At the end of Mr. Kelly's examination, plaintiff's Counsel read in evidence the bill of exchange, and the entry in the book, and closed his case. Defendant's Counsel thereupon called on the learned Judge to direct a verdict for the defendant, on the ground that the acceptance of the bill by the authority of the bank was not proved. The learned Judge refused to do so, and ruled that there was evidence in support of the issue, on which the jury might find that William Kelly had authority to accept the bill. The question is, whether on the evidence as it then stood, bearing in mind that the deed of settlement was not at this time in evidence, the Judge would have been justified in nonsuiting the plaintiff, or in ruling that there was no evidence to be submitted to the jury, that this was an acceptance binding on the bank? The evidence at that stage of the case was this, that James Sadleir to all appearance was the sole director of the bank ; that he alone appeared to be transacting the business of the bank ; and that William Kelly was the person whose business it was to accept all bills of exchange for the bank ; therefore, as the evidence then stood, it amounted to this—that the only persons transacting the business of the bank were, one director and one manager ; there was nothing to show how many directors there were, or that there ever in fact was more than one. We are therefore of opinion that at that particular stage of the case, in the absence of the deed, the Judge could not have yielded to defendant's objection, and ruled that there was no case to be submitted to the jury. We are therefore of opinion that the third exception should be overruled.

The defendant's Counsel then stated his case, and called James M'Donnell as a witness. His evidence goes to show the nature of the dealings and transactions between John Sadleir and the bank, and the number of cheques paid, &c. He said that, up to a particular time, a book of John Sadleir's was kept at the office of Messrs.

Morrogh & Kennedy, in an inner office; that they had access to the books; and that they were also attorneys to Mr. Eyre at that particular time. I suppose this evidence was given with the object of endeavouring to bring home to Messrs. Morrogh & Kennedy knowledge of the transactions in relation to this particular bill of exchange, indorsed to Mr. Eyre. That evidence being given, the defendant next produced as a witness Mr. Robert Murray, the well-known manager of the Provincial Bank. Mr. Murray was handed the bill, the subject of this action, and was asked whether it was such a bill as a bank, according to banking usage, would, in the ordinary course of business, accept for an inland customer? There is no doubt that the question was one which assumed that he had some knowledge on the subject; and doubtless, if he had not, the proper answer would have been given, that he was not acquainted with the bank usage, and therefore could not answer the question. It assumes that there is a banking usage, and that that banking usage is known to Mr. Murray, and that he is a competent witness to depose thereto. The first point therefore is, is the question objectionable, on the ground of its assuming these particular things? We do not think it objectionable merely because it assumes that there is a banking usage, and because it assumes that the witness Mr. Murray is acquainted with that usage. Unless in fact such usage existed to his knowledge, he would say that he knew nothing of any such; and the question would fall to the ground. Assuming then that the question is not objectionable technically on a point of form, it remains to be considered whether it is objectionable in substance. It seems to us that it is not objectionable in substance; as evidence might have been given that Mr. Kelly's authority to accept was confined to bills presented in the ordinary course of banking, and not to exceptional cases. We therefore are of opinion that this question ought to have been allowed to be asked of Mr. Murray; and therefore that this exception should be allowed.

It was next proposed to ask Mr. Murray, would a bill, so accepted, put a party on inquiry as to the authority of the acceptor? For some time we were certainly under the impression that that was asking Mr. Murray a question of law—namely, whether a party

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was bound to inquire and take notice of a bill accepted *per procuration*? If that were the true construction of the question, it would appear to us to be objectionable, as asking a witness a point of law, which ought to be decided by the Judge; subject, of course, to the revision of the Court above. But, as we understand the question, it is not asking Mr. Murray what the law is, but what is the practice in fact: and whether his evidence would have any bearing on the case, if his evidence of the fact differed from the law of the land, might be a matter afterwards for the consideration of the Court. But we are of opinion that, as a matter of fact, the question was one proper to be put, and therefore that this exception should also be allowed.

It was next proposed to ask Mr. Murray whether an authority to indorse was an authority to accept? This illustrates what I have stated in reference to a previous exception; this was asking Mr. Murray a mere question of law: and accordingly we think that that question ought not to have been allowed to be put; and therefore we overrule this exception, the sixth in number.

The next matter given in evidence was the deed of settlement, regulating this bank. Two of its clauses are set out in the bill of exceptions, and it will not be necessary for me to refer more in detail to the other clauses of the deed. One of these clauses provides that three directors should be necessary to constitute an ordinary, and five to constitute a special Board of Directors. The 92nd clause is in these words:—"That the Court of Directors shall make all such regulations and rules, and give to the secretary or other person or persons in the employment of the society, all such powers, not inconsistent with any of the provisions contained in these presents, with regard to the drawing, indorsing, or accepting of bills, the signing of receipts, and the lending or otherwise disposing of the funds or property of the society; and all such other powers generally in regard to the funds or property of the society, and the management of the business thereof, as the Court of Directors shall in their discretion think proper; subject however to the control of a general meeting."

It was admitted that it did not appear from the bank books that

a Court of Directors had acted at all. The defendant then gave in evidence the several cheques, and closed his case. The plaintiff's Counsel asked for a direction for a verdict on all the issues. The defendant's Counsel submitted that the question of authority—that is, whether, under all the circumstances proved in the case, William Kelly had authority to accept the bill in question—should be left to the jury; of course, with such directions and suggestions as to the law and evidence as might occur to the Judge to be right. The defendant's Counsel however did not ask for a direction, but merely that the question of authority should be left to the jury. The learned Judge instructed the jury, that if they believed that William Kelly, as manager of the Tipperary Bank, signed the bill of exchange in the summons and plaint mentioned, by direction of James Sadleir, and that James Sadleir was at the time director of the bank, they should find for the plaintiff on the first issue, and that there was no evidence for the defendant on the other issues; that is, in other words, that inasmuch as the bill was accepted by William Kelly, as manager of the Tipperary bank, by direction of James Sadleir, who was the acting director of the bank, same was binding on the Banking Company as their acceptance. This, being the really important question in the case, has been argued at considerable length, plaintiff's Counsel contending that, so far as the public are concerned, a Joint-stock Banking Company is to be governed by the same rules as an ordinary mercantile firm, consisting of several partners; in which case, of course no doubt exists that the acceptance of a bill of exchange by one of the partners, in the course of business, in the name of the firm, binds the other members of the partnership; so far, at all events, as a *bona fide* indorsee is concerned; though, as between the partners themselves, the bill of exchange may have been accepted by one partner in violation of an agreement or understanding between him and his partners. No doubt, if this agreement is well founded, the direction of the learned Judge was correct; as, if this was the case of a mere general banking firm, one can entertain very little doubt but that the acceptance would be binding on them, in the hands of the plaintiff Mr. Eyre, a *bona fide* holder for value, without notice of any of the circum-

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stances under which the bill was accepted, for the benefit or accommodation of John Sadleir. But it is now settled by the highest authority that the contracts of joint-stock companies, formed under the provisions of the Act of Parliament, are to be governed by rules altogether different from that of private mercantile copartnerships. The case to which I particularly refer is *Ernest v. Nicholls* (a), the facts of which it is unnecessary to state. It is sufficient to refer to the judgment of Lord Wensleydale, commencing p. 417, in which he says that the principles of law upon which the liability of joint-stock companies is to be decided are clear and perfectly settled, though not always in practice steadily kept in view. After stating the law of ordinary partnerships, and showing its inapplicability to cases of joint-stock companies, and that parties dealing with such companies have an opportunity of informing themselves of the provisions of the deed of settlement, and that all persons dealing with such companies must take notice of the deed and the provisions of the Act; and that if they do not choose to acquaint themselves with the powers of the directors it is their own fault; and if they give credit to any unauthorised persons they must be contented to look to them only, and not to the company at large: he proceeds to show that the stipulations of the deed, which restrict their authority, are obligatory on those who deal with the company; and that the directors can make no contract, so as to bind the whole body of shareholders for whose protection the rules are made, unless they are strictly complied with; the contract binding the person making it, and no one else. It is not necessary for me to state in detail the other parts of the learned Lord's able judgment, in which he refers to the several cases on the subject which establish the doctrine which he states to have been there fully settled. It is quite clear, that if the doctrine laid down in this case has any application to the case before us, that Mr. William Kelly, though acting by the direction of James Sadleir, had not *prima facie* any authority to bind the shareholders of the Banking Company, by his acceptance of the bill of exchange in question. But it has been argued, by Mr. Eyre's Counsel, that however

(a) 6 H. of L. Cas. 401.

this doctrine may apply to John Sadleir, the drawer of the bill, and who was aware of the circumstances under which it was accepted, that it does not apply to him, a *bona fide* indorsee for value, and without notice. To this, it has been answered that, in the present case, it is unnecessary to consider whether even indorsees of bills of exchange, accepted on behalf of a joint-stock company, are or are not bound at their peril to see that the person who accepts has in fact authority to do so. But, be that as it may, defendant's Counsel insist that, inasmuch as this bill of exchange, on the face of it, purports to be accepted by William Kelly, *per procuration*, on behalf of the Banking Company, that even an indorsee for value is bound, at his peril, to see that the person so accepting *per procuration* has authority to do so. And this is the conclusion we have come to.

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The recent case of *Stagg v. Elliott (a)* is the last case on this subject, and refers to all those that preceded it. In that case the bill of exchange was accepted by George Elliott, in the name of, and *per procuration* of, his father, the defendant. He was his father's agent, residing in London, and transacting business for his father, who carried on business and resided in a provincial town. The son had accepted a great number of bills in the same form for his father, all of which were duly paid. His authority to accept for his father was confined to bills drawn on him, in the way of his business, for goods supplied. The jury found that the bill on which the action was brought was not drawn in the course of business, for goods supplied, but on some accommodation account between the drawer Edward Bradley, and George Elliott the son of the defendant, who so accepted it *per procuration* in his father's name. It was conceded that the plaintiff Stagg was a *bona fide* indorsee for value, who received the bill believing that the son was authorised to accept it on behalf of his father. At the trial a question was raised, whether the bill had been at all accepted by the son, but the jury found that he had accepted it, and the plaintiff had a verdict. On motion for a new trial, the case was fully argued; the only question being, as the bill was accepted *per procuration*, whether the indorsee, the

(a) 12 C. B., N. S., 373.

E. T. 1863. *Common Pleas* plaintiff, was not bound to see that the person who so accepted had authority to do so? Chief Justice Erle's judgment is not long, and I may be excused for reading it:—"I am of opinion," he says, **EYRE** v. **M'DOWELL**. "that my Brother Shee (the defendant's Counsel) is entitled to have his rule made absolute. It seems to me that an acceptance in this form is one which the party discounting it takes at his own peril, as is stated in *Smith's Mercantile Law*, p. 264. The cases of *Atwood v. Munnings* and *Alexander v. Mackenzie* are distinct authorities for this position. *Grant v. Murray* is strong to the same effect. Where the bill, on the face of it, purports to be accepted *per procuration*, that is a notice to all the world that the person who accepted it has but a limited authority, and whoever takes it does so at his own peril. Here it is perfectly clear that George Elliott the agent had no authority to bind his father the principal, by his acceptance of any other than trade bills. I was wrong in not giving effect to the objection. There must therefore be a new trial." The other Judges concurred; and so clear were they on the point, that leave to appeal was refused. We therefore are of opinion that on this issue, whether the bill was the acceptance of the Banking Company, Mr. Eyre cannot derive any peculiar advantage from the fact of his being indorsee for value, and without notice. In our opinion therefore the seventh exception, which required the learned Judge to submit to the jury the question as to Kelly's authority to accept, must be allowed. It will be observed that the defendant's Counsel did not, by this exception, require the Judge to rule that there was no evidence of authority in Kelly to accept; and we think rightly: as, though we do not mean to lay down, by anticipation, in what way the case should be submitted to the next jury who may try the case, when probably there may be much more evidence than was at the last trial, yet still it may be of some use to the parties, and therefore I may be excused for stating, having regard to the evidence, that there did not appear to be three directors, and no acting director save James Sadleir, who transacted all the business of the bank. The substance of the question which we think ought to have been submitted to the jury at the last trial,

namely, whether, by the consent and acquiescence of the shareholders, the provisions of the deed of settlement had been abandoned, and Mr. Kelly, acting under the direction of James Sadleir, had authority to accept, in the name of the bank, bills of exchange circumstanced like the present, which may depend on the question whether the authority, if any, extended to all bills generally, whether accommodation or not, or only to such bills as were drawn in the ordinary course of the business of bankers; and, if the authority was of the limited kind, whether the bill in question fell within it?

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The only remaining exception is the eighth, by which defendant's Counsel called on the Judge to leave to the jury the question whether, in the words of the ninth defence, "the Banking Company was induced to accept the said bill through the fraud of John Sadleir?" and whether the plaintiff, through his solicitors Messrs. Morrogh and Kennedy, had not notice of this fraud when the bill was indorsed to him? For this latter proposition there is not, in our opinion, any evidence whatever. It is unnecessary to inquire whether there was any evidence of fraud on the part of John Sadleir—certainly none, so far as James Sadleir and Kelly the manager of the Bank were concerned. But whether there was or was not any evidence of fraud, as against the shareholders, between the two Messrs. Sadleir, James and John, there is certainly no evidence of any knowledge on the part of Mr. Eyre. It does not appear that his attorneys, Messrs. Morrogh & Kennedy, were at all parties to, or employed in, the indorsement of the bill to him; and even if they, in any previous transactions, were aware of the state of the account between John Sadleir and the bank, there is no ground whatever for the proposition that Mr. Eyre their client is bound by this notice, they not being employed in the particular transaction—namely, the indorsing of the bill to him—when such became material. We are therefore of opinion that the eighth exception should be overruled.

The result of our judgment therefore will be, to overrule the first, third, sixth, and eighth exceptions, and to allow the second, fourth, fifth, and seventh; and award a *venire de novo*.

E. T. 1863.  
*Common Pleas*

HALLORAN and wife v. THOMPSON.

May 1, 31.

Action for a libel contained in a letter addressed by the defendant to an attorney, who had been employed by the plaintiff to sue a third party for a sum of money alleged to be due to him, and the purport of which letter was, to dissuade the attorney from proceeding with the suit. The letter went on to charge the plaintiff's wife with having created a turmoil in her neighbourhood. The defendant pleaded that the plaintiffs were the tenants of a party to whom the defendant was land agent, and A was bailiff of the estate; that in pursuance of an agreement between the parties, and by the direction of the defendant, A had sold the interest of the plaintiffs in their holdings; which sum A afterwards duly applied in pursuance of the terms of the agreement; but which application the plaintiffs had refused to ratify, and employed the attorney to sue A for the amount; and that under the circumstances, as aforesaid, the defendant did write and publish the said letter, believing the matters therein stated to be true, and to protect his said servant, the said A, from vexatious litigation, as he lawfully might, for the causes aforesaid.

*Held*, that this was a good plea of privileged communication; and that, notwithstanding the absence of an averment that the publication was *bona fide* and without malice, it sufficiently appeared that the writing of the letter was written exclusively for the purpose mentioned in the latter clause of the defence, which excluded the inference of malice.

*Held also*, that if the defence showed that the privilege had been exceeded, the alleged excess was a matter only for the jury to consider on the question of malice, and did not vitiate the defence.

THIS was an action for libel. The summons and plaint contained three counts; in the first two of which the plaintiffs claimed damages jointly, and in the third the husband claimed damages separately. The libel complained of was contained in a letter dated "Shannon Harbour, 8th of October 1862," and was addressed by the defendant to one Thomas Lalor Cooke, the plaintiffs' attorney, and was as follows:—"Sir, I have just been shown a note from you to Mr. W. Henderson, on the subject of instructions received from Mrs. Halloran of Cloneybeg, on the subject of a sum of £33, which Henderson holds from her and received from Mr. Quade. I think it right that you should be put in possession of the whole case relative to Mrs. Halloran, and the money above mentioned. This Mrs. Halloran has been very troublesome for some time past, and has brought the neighbourhood in which she lives into a turmoil by the most reprehensible conduct; so much so, that it as much as her life is worth to remain here, consequently she has been permitted to dispose of her holding and crop; a proceeding which was sanctioned by Mr. Thompson her landlord, in order to enable her to get off at once. Of course this was on the written undertaking that her lawful debts, and all rent due, should be paid out of the amount received. I came here this day to have the

"matter settled. The whole sum obtained for her 'goodwill' of her farm was £33. She owed a bill to a shopkeeper in this village, of £16. 12s. 11d., the accuracy of which I myself tested by an examination of his books. This I deducted, along with a further sum of £1. 5s., which she was lent in cash, and does not dispute, and one year's rent, due up to May last, £2. 6s. 6d. These several sums being subtracted, left a balance of £12. 15s. 7d., which I tendered to her in gold and silver this day, in the presence of the sergeant of police, Mr. Thompson, and several others. She however refused to receive it; consequently Mr. Thompson holds himself perfectly free to retract his permission to dispose of his farm at all, if he should so determine. You will observe as aforesaid, that it was a favor to allow this woman to sell her goodwill; and that she has no title whatever to look for any further indulgence. I have thought it right to inform you of this, in order to prevent your proceeding against Henderson, and thus involving Mrs. Halloran in costs, which are sure to fall on her." The defendant pleaded that before he wrote the letter complained of, the plaintiffs had been the tenants of Peter Hamlet Thompson, Esq., of Cloneybeg, in the King's County, and defendant was the agent of said P. H. Thompson over said lands, and said Wm. Henderson was employed by defendant as bailiff on the estate; that before writing said letter, and while plaintiffs were tenants, said Mary Halloran, by prosecuting the neighbours for petty trespasses, and bringing or causing to be brought false charges against them, and by endeavouring it to be believed that some of them had assaulted her daughter, and that they had posted a threatening letter on her house, did disturb the harmony and good feeling which theretofore had prevailed among the tenantry, and created so much bad feeling among the said tenants against herself, that it was necessary, by stopping in her house, and other measures, to give her personal protection; that a memorial, signed by a great number of tenants, was presented to said P. H. Thompson, dated the 16th of September 1862, complaining of said Mary Halloran, and her son and daughter, and of their concerting prosecutions against them; that in consequence of the said memorial,

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and of the bad feeling existing among the tenants against the said Mary Halloran, as aforesaid, and in order to restore harmony and good feeling among them, by removing said Mary Halloran and her family from among them, the said P. H. Thompson allowed the plaintiffs, as a favor, to sell and dispose of their goodwill in the lands held by them as such tenants; but upon the express agreement that, out of the proceeds thereof, and of the crops on the said lands, the debts of the plaintiffs in the neighbourhood, and the arrears of rent due to P. H. Thompson, should be paid: that in pursuance of said agreement and permission, said W. Henderson, by direction of defendant as such agent, did sell the goodwill of the plaintiffs in said lands, and the crops thereon, for the sum of £33; and which sum the defendant, as such agent, duly applied in accordance with the terms of the agreement, in the manner in said letter specified; that plaintiffs afterwards refused to comply with said agreement, or to the application of said sum of money, and employed the said Thomas Lalor Cooke, an attorney, to sue the said W. Henderson for the said sum of £33: and that under these circumstances he wrote and published the letter complained of, believing the matters therein stated to be true, and to protect his said servant, W. Henderson, from vexatious litigation, &c.

Demurrer, on the ground that this defence did not show any matter to constitute same a privileged communication, or to rebut the inference of malice.

*O'Driscoll* (with whom was *Heron*), in support of the demurrer, contended that the defence was bad, if taken as a plea of justification, inasmuch as it did not attempt to justify the charges alleged against Mrs. Halloran: *Dunne v. O'Grady* (a); *Helsham v. Blackwood* (b).

The plea is bad as a plea of privileged communication; for a man is not privileged to write to an attorney to dissuade him from suing an individual with whom the former is not in privity. There is neither a duty nor an interest in the defendant to warrant

(a) 5 Ir. Com. Law Rep. 450.

(b) 11 C. B. 111.

such a statement: *Beatson v. Shene* (a); *Owens v. Roberts* (b); *Harrison v. Bush* (c); *Huntley v. Ward* (d); *Martin v. Strong* (e); *Praeger v. Shaw* (f); *Cooke v. Wildes* (g); *Wennan v. Ash* (h); *Ede v. Scott* (i). The plea is also defective for want of averring expressly that the letter was written *bona fide* and without malice. *Carr v. Duckett* (k) is distinguishable, as there the words "not otherwise" were used.

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*Todd* and *Chatterton*, contra, contended that the defence sufficiently justified the charge against Mrs. Halloran of litigious conduct, which was the sting of the libel: *Morrison v. Harmer* (l); *Tighe v. Cooper* (m).

It is at all events sufficient, as a plea of privileged communication. There was a relation of master and servant between the defendant and Henderson, which entitled him to interfere to protect Henderson, who had a right to indemnity from his employer: *Ruckley v. Kiernan* (n). An excess of the privilege is only evidence of malice, for the jury: *Somerville v. Hawkins* (o). The absence of the averment of *bona fides*, and the negation of malice, is supplied by the context. So it was held in *Carr v. Duckett*, where, on demurrer, the plea was held good. The defendant cannot simply deny malice, but must show facts which rebut its existence: *Dixon v. Franks* (p).

*Cur. ad. vult.*

MONAHAN, C. J.

This is an action for a libel on the plaintiff Mrs. Halloran, contained in a letter written by the defendant, to an attorney employed

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May 31.

(a) 5 H. & N. 838.

(c) 5 El. & Bl. 344.

(e) 1 N. & P. 29.

(g) 5 El. & Bl. 328.

(i) 7 Ir. Com. Law Rep. 607.

(l) 3 Bing. Pl. 759.

(n) 7 Ir. Com. Law Rep. 75.

(b) 4 Ir. Com. Law Rep. 386.

(d) 6 C. B., N. S., 514.

(f) 4 Ir. Com. Law Rep. 680.

(h) 13 C. B. 836.

(k) 5 H. & N. 783.

(m) 7 El. & Bl. 639.

(o) 10 C. B. 563.

(p) 7 Ir. Jur. 239.



T. T. 1868. by the plaintiff J. Halloran, to sue one Henderson, for money alleged  
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 THOMPSON. to this the defendant has pleaded as follows.—[His Lordship read the defence.]—It is certainly very difficult to know whether this was intended as a plea of justification, on which the issue would be, whether the matters stated in the alleged libel are true in fact; or whether it is a plea of privileged communication, on which the legal question would arise, whether the occasion was privileged; and the question of fact, not whether the libellous matter was true; but, did the defendant honestly and *bona fide* believe it to be true, and did he write the letter without malice? These questions are so very different, that if an application had been made to set aside the defences as embarrassing, it occurs to me that the defendant would have been obliged to amend the defences; making it clearly one or other of the two defences I have stated; and that he would not have been permitted to have it a compound of both. On demurrer, however, all we can do is to see whether the plea contains a sufficiency of allegation to make it a good justification; or a good defence as a privileged communication. We have come to the conclusion that it contains more of the elements of a privileged communication than of a justification; and therefore I shall proceed to consider it as such. The first question is, was the occasion privileged? If the person about being sued was the defendant Mr. Thompson, no one could entertain a doubt that he would be justified in writing to the plaintiffs' attorney, to save himself from expense, and what he considered unfounded litigation, a full and fair account of the circumstances out of which the threatened litigation arose, though such communication contained matters *prima facie* libellous of the plaintiff in the intended action, or of his wife. The case would be comprised within the rule laid down by Baron Parke, in *Toogood v. Spyring* (a), as a letter written by the defendant, with reference to the conduct of his own affairs, and in a matter in which his interest was concerned. The case of *Huntley v. Ward* (b) was referred to by plaintiffs' Counsel, as an authority that the defendant, in an intended action, was not

(a) 1 C. M. &amp; R. 181.

(b) 6 C. B., N. S., 514.

privileged in libelling the plaintiff to his attorney; but on looking at the judgment of the Court in that case, as delivered by Willes and Byles, JJ., it is clear that they held the communication not privileged, because the libellous matter consisted of gross and unjustifiable charges, altogether unconnected with the subject-matter of the action: and no one can doubt that they would have held the communication privileged, if connected with the subject of the threatened suit. In this Court, in the case of *Ruckley v. Kierman* (a), we held that the protection extended not merely to the defendant in a suit, but to his attorney, who imputed perjury to the plaintiff, the clerk of plaintiff's attorney in the pending action; and that any expressions used in excess of what the occasion required or warranted, did not divest the communication of the privilege being conversant with the subject-matter of the privilege, though such excess might be used as evidence of malice, in fact, to be as such submitted to the jury.

It has, however, been properly pressed by the plaintiff's Counsel, that the litigation was threatened here, not against the defendant, but a third person—Henderson. This reasoning would, no doubt, be correct, if Henderson were in fact a third person unconnected with the defendant; but when it is recollected that Henderson was the defendant's servant, who received the money, the subject of the threatened action, by defendant's directions, and who disbursed it in pursuance of his directions; and who, if held responsible, or if he incurred costs in defending himself in the threatened action, would certainly, in justice, and, I should also say, in law, be entitled to be indemnified by the defendant Mr. Thompson, whose orders he obeyed. We are of opinion that, under the circumstances, the occasion was privileged, just as if the action had been threatened against the defendant Mr. Thompson himself.

But then arises another question, and one on which I must confess that for some time I felt considerable difficulty:—Assuming the occasion to be a privileged one, the defence, to be good, must contain an express or implied averment that the defendant wrote the matters contained in the alleged libel believing them to be true, and not

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(a) 7 Ir. Com. Law Rep. 75.

T. T. 1863. being actuated by malice ; and plaintiff's Counsel has forcibly urged  
*Common Pleas* that there is not, in this defence before us, any denial of malice.  
HALLORAN Defendant's Counsel rely on the statement in the plea, that he wrote  
v. THOMPSON. the letter "to protect his said servant Henderson from vexatious  
litigation," as implied by averring that such, and such only, was his  
object, and therefore negating any malicious object ; and for this  
purpose they rely on the case of *Carr v. Duckett (a)*. In that case  
the plaintiff advertised, for sale by auction, certain personal pro-  
perty, consisting of the working plant of a stonemason and con-  
tractor. The defendant published a counter-advertisement, alleging  
that the plaintiff unlawfully detained certain property of the de-  
fendant, and that he was informed the plaintiff intended disposing  
of it at the auction ; he therefore cautioned the public from  
purchasing any part of this property at the intended auction.  
Plaintiff brought his action for the libellous matter contained in  
defendant's advertisement. Defendant pleaded that plaintiff unlaw-  
fully detained certain goods of the defendant, and defendant believed  
that he intended disposing of same with his own goods at the auc-  
tion, and that he (the defendant) published his advertisement for the  
purpose of warning all persons from purchasing his (the defendant's)  
goods, and not otherwise. This plea was demurred to, and similar  
objections taken to it, as to the defence in the present case. In  
England, the defence of privileged communication is generally  
given in evidence under the general issue ; here, it must be spe-  
cially pleaded : but having been specially pleaded in that case, of  
course the special plea should have contained all matters necessary  
to be proved under the plea of the general issue, and, amongst  
others, the absence of malice. In giving judgment, the Chief  
Baron says ;—"There must be judgment for the defendant. When  
"the plea is examined, it is plain it is nothing more than the  
"general issue. The defendant says he published the alleged libel  
"for a certain lawful purpose, and not otherwise ; therefore he in  
"fact negatives the charge that he published it maliciously. If an  
"application had been made to a Judge at Chamber, he would  
"perhaps have struck out the plea, or ordered it to be amended ;

“but, upon demurrer, I think it good.” Baron Bramwell says:—  
 “I also think the plea is good, and that it amounts to the general  
 “issue; for it would not be proved unless under the allegation that  
 “the defendant published the alleged libel for the purpose of  
 “warning all persons from purchasing his goods. It was shown  
 “that it was done *bona fide*, and without malice. On this part of  
 “the case, I may refer shortly to the judgment of this Court,  
 “delivered by me, in the case of *Ruckley v. Kiernan*, already  
 “referred to—[pp. 79 and 80 of the report]. I state the opinion  
 “of the Court, that in order to give effect to the present system of  
 “pleading, that if a party will demur, instead of applying to the  
 “Court to set aside a defence as embarrassing, that the Court  
 “ought to give to the pleading, demurred to, the meaning that will  
 “support it, if the words will fairly bear such a meaning, rather  
 “than the meaning which will not support it.”

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Applying the doctrine of these cases to the case now before us, we are of opinion that if the plaintiffs, instead of demurring to the defence in question, had issued a summons to settle the issues, the Judge who settled them would have been bound to hold that the plea impliedly traversed that the defendant acted maliciously, and to give the issue in a form which would raise the question whether the defendant, in writing the letter in question, acted *bona fide*, and without malice.

On the whole therefore we have come to the conclusion that the defence is sufficient, and that the demurrers must be overruled.

M. T. 1861.

Queen's Bench

ALEXANDER HENRY SLATOR,  
 By GEORGE WARNER SLATOR his next friend, and the said  
 GEORGE WARNER SLATOR and  
 JAMES FREDERICK NOLAN, *Plaintiffs*;  
 V. TRIMBLE, *Defendant*.  
 SAME v. BRADY; SAME v. LENNON.\*

(Queen's Bench.)

Nov. 23, 25.

**EJECTMENT ON THE TITLE.**—These three actions were severally brought to recover lands, part of the estate of Whitehill, in the barony of Granard, in the county of Longford. The three cases were precisely similar, and it will be sufficient to state the facts of *Slator v. Trimble* alone. It appeared that, on the 19th June 1860, A, while an infant, made a lease to B, of certain lands, reserving a rent; and during his minority commenced an action of ejectment, by C his next friend, against B, laying the demise on the 23rd January 1861. A attained full age on the 27th April 1861; and on the 29th April, in the same year, executed to C a lease of all his estate of W. (including the lands demised to B), and that lease contained a covenant to avoid all the leases on the W. estate, made by him during his minority.

A, on the 14th of June 1861, received from B the half-yearly gale of rent due on the 1st May 1861, in respect of the lands demised to him, and on the same day gave a receipt to B for that gale of rent, and executed a confirmation of B's lease. No step had been taken in the ejectment proceedings from the time when A came of age until the execution of the confirmation. The ejectment having been afterwards proceeded with, and a verdict had for the plaintiff, on motion that that verdict should be set aside, and a verdict entered for the defendant—

*Held*, that as A was estopped by his receipt of rent from disputing B's title for the period between the 1st November 1860 and the 1st May 1861, he could not maintain an action of ejectment against B, in which the demise was laid on a day within that period.

*Held also*, that by the execution of the confirmation, A was precluded from relying on the lease to C, either as an avoidance of the lease to B or for the purpose of showing that, at the date of the confirmation, he had no estate sufficient to enable him to confirm that lease.

*Held also*, that the confirmation, although made subsequently to the commencement of the action, related back so as to set up the lease to B from the day of its execution.

*Held also*, that the 204th section of the Common Law Procedure Act 1853 does not apply to a case where the plaintiff takes title out of himself.

*Held, per O'BRIEN and HAYES, JJ.*—That where an infant makes a lease, reserving a rent, he cannot avoid it until of full age.

The case of *Thornton v. Illingworth* observed on.

\* Before O'BRIEN, HAYES, and FITZGERALD, JJ.

the plaintiff Alexander H. Slator, being then under age, and tenant for life in possession of the Whitehill estate, under a settlement, executed on his marriage, made a lease of part of the lands of Whitehill to the defendant Trimble, for the life of the plaintiff or twenty-one years. On the 24th January 1861, demand of possession having been previously made, the present ejectment proceedings were instituted, in the name of Alexander H. Slator, by his next friend and uncle George W. Slator. On that day the plaint in ejectment was filed, laying the demise on the preceding day, namely, the 23rd January. Defence was taken on the 9th February following. Notice of trial was served for the ensuing Spring Assizes, but was afterwards withdrawn. On Saturday the 27th April 1861, the plaintiff Alexander H. Slator attained his full age; and on the Monday following, viz., on the 29th April 1861, he executed a lease to his uncle George W. Slator, of the entire of the Whitehill estate, including the lands the subject of the present ejectment, for the life of the said Alexander H. Slator or twenty-one years, at a rent of £500 a-year; and that instrument contained a covenant on the part of Alexander H. Slator to avoid all the leases of the lands of Whitehill, made by him during his minority. That lease was duly registered on the 6th May; the lease to the defendant never had been. It was admitted, on the part of the plaintiff, that at the time of the execution of the lease of the 29th April 1861, George W. Slator had full knowledge of the defendant's lease of the 19th June 1860. On the 14th June, Alexander H. Slator received from the defendant the half-yearly gale of rent which accrued due on the 1st May 1861, under the lease of the 19th June 1860; and on the same day he gave a receipt for that gale of rent, and executed, by way of indorsement on the lease, an express confirmation of that instrument. On the 26th June, notice of trial was served for the then ensuing Longford Summer Assizes, and accordingly the cases came on to be tried at those Assizes. Although, in each of the three cases, George W. Slator and James F. Nolan were joined as co-plaintiffs, it was merely as trustees of a term of years, created by the marriage settlement of Alexander H. Slator, in which right it was not contended that they were entitled to a verdict, but the

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action was treated throughout as the action of Alexander H. Slator alone. At the Assizes, the case of *Slator v. Brady* came on first, and was tried before the Hon. Mr. Justice Christian and a special jury. The case put forward by the plaintiff was this:—That the lease of the 19th June 1860 was not only voidable by reason of its having been made during minority, but that it was absolutely void as having been obtained by imposition and fraud, and while Alexander H. Slator was in a state of incapacity from intoxication: and further, supposing that instrument was merely voidable, yet that there had been no confirmation of it valid and binding on him, inasmuch as the confirmation relied on by the defendant was subject to the same imputation of fraud as the lease, and that the ejectment proceedings operated as an avoidance of that lease. Evidence as to the character of these transactions was gone into; and at the close of the defendant's case, the plaintiff proposed to give in evidence the lease of the 29th April 1861, by way of a rebutting case. This instrument the learned Judge refused to receive, on the ground that it had not been opened in the statement of the plaintiff's case, and no reservation had been made by him of the right to go into a rebutting case. At the close of the case, the learned Judge left the following questions to the jury:—First, whether the lease of the 19th of June 1860 was void by reason of fraud, or incapacity of the plaintiff at the time of the execution of that instrument? and, secondly, whether, at the time of the execution of the confirmation, he was of capacity to understand the nature of that act? The jury brought in special findings, on both these questions, in favor of the defendant; and, by consent, a verdict was taken for the plaintiff, with liberty reserved to the defendant to have that verdict set aside, and a verdict entered for him, if the Court above should be of opinion that, upon the whole case, the plaintiff was not entitled to recover.

In the case of *Slator v. Trimble*, tried before Mr. Justice Ball, as well as in the third case, of *Slator v. Lennon*, tried before Mr. Justice Christian, the lease and confirmation had been executed on the same occasions respectively as in the case of *Slator v. Brady*, and in every respect the three cases were precisely similar. In

these cases the plaintiff acquiesced in the previous findings, as to the *bona fide* character of the leases and confirmations, and transactions connected with them; but the lease to George W. Slator, of the 29th April 1861, was made part of the plaintiff's case.

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A verdict was taken, in these cases also, for the plaintiff, with a similar liberty reserved to the defendants as in the case of *Slator v. Brady*.

A conditional order having been obtained, on the 6th of November, in the present Term, in each of the three cases, that the verdict had for the plaintiff should be set aside, and a verdict entered for the defendant, pursuant to the leave reserved—

Serjeant *Armstrong*, *Macdonogh* and *Dowse*, now showed cause. *Brooke*, *McCausland*, and *J. Richardson*, in support of the conditional order.

Serjeant *Armstrong*.

The lease of the 19th of June 1860, having been made by Alex. H. Slator when an infant, was voidable by him either before or after he attained his full age. "If an infant bargain and sell lands "which are in the realty, by deed indented and enrolled, he may "avoid it when he will:" 2 *Co. Inst.*, p. 673. "If an infant "within the age of twenty-one years make a feoffment in fee, "or a lease for years, he himself shall avoid his feoffment or "lease as well within age as of full age, although he shall not "have a *dum fuit infra ætatem* within age, because the writ "supposeth him to be of full age:" *Fitz Herbert's Nat. Brev.*, p. 202. The present proceedings in ejectment, though commenced while Alexander H. Slator was under age, were sufficient to avoid the lease of June 1860; and the subsequent confirmation of that instrument by him, after he attained his full age, cannot be relied on here, so as to set up a void unregistered lease as against a subsequent *bona fide* registered instrument, namely, the lease to George W. Slator. The plaintiff is at least entitled to costs. Where, between the bringing of the action and verdict, the title of the plaintiff in ejectment expires, he will nevertheless be entitled to costs: *Thrust-*



M. T. 1861. *out d. Turner v. Grey (a); Doe d. Butt v. Rouse (b); Doe d. Queen's Bench Morgan v. Bluck (c); Common Law Procedure Act 1853, s. 204.*  
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 Counsel also cited *Zouch v. Parsons (d); Co. Lit., 380 b.*

*Brooke.*

An action of ejectment cannot be commenced by an infant during his minority, to defeat a lease made by him for his own benefit; such a lease made by an infant cannot be avoided by him until of full age.\* "Also, most of our books agree that, if a rent were reserved "on such lease for years, then it would be only voidable at full "age:" *Bac. Abr., tit. Lease, B, p. 643, 7th ed.* No adoption of the present action by Alexander H. Slator after he came of age, can set up or validate proceedings void *ab initio*. The plaintiff must succeed on the title which he had on the day on which he laid his demise.

The lease to George W. Slator is out of the case altogether. The present plaintiff Alexander H. Slator cannot rely on that instrument for the purpose of invalidating his solemn confirmation of the lease to the defendant. Whatever use might be made of that lease in an ejectment by George W. Slator, Alexander H. Slator cannot be permitted, in this action, to make use of it for the purpose of defeating his own deliberate act.

There is no doubt if a plaintiff in ejectment lose his title between the bringing of the action and verdict, there, though the *habere* cannot be executed, the plaintiff shall have judgment for his costs: *Ryan v. Landers (e)*. But that does not apply to a case like the present, where the plaintiff takes title out of himself.

*M'Causland.*

The present proceedings in ejectment were brought in January 1861, and the receipt for rent is dated the 14th of June following, and is for the gale of rent due on the 1st of May 1861. Now there

(a) 2 Str. 1056.

(b) 1 Ell. & Bl. 419.

(c) 3 Camp. 447.

(d) 3 Burr. 1794.

(e) 9 Ir. Com. Law Rep. 487.

\* See judgment of Buller, J., in *Madden v. White*, 2 T. R. 159.

is no rule of law better established than this, that if a tenant pay rent to his landlord he is estopped from disputing his landlord's title for the period in respect of which he paid rent; and so, on the ground that estoppels are mutual, a landlord cannot dispute his tenant's title for the same period.—[FITZGERALD, J. If that were not so, a landlord could recover mesne rates for the period for which he received rent.]

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An infant's lease is voidable, and not void: *Allen v. Allen* (a); *Zouch v. Parsons* (b). But a lease made by an infant for his own benefit is not voidable by him until of full age: *Furlong's Landlord and Tenant*, p. 112; *Cole on Ejectment*, p. 584; *Bac. Abr.*, tit. *Infancy*, I, p. 598, 5th ed.

A confirmation by an infant after attaining his full age, of a lease made by him during his minority, relates back so as to validate the lease from the date of its execution; and therefore, whatever effect the present proceedings might have had to avoid the defendant's lease, in case no confirmation of that instrument had ever been made, that effect is done away with entirely by the subsequent confirmation and receipt of rent.

*Macdonogh*, in reply.

It was competent for Alexander H. Slator, during his minority, to avoid the defendant's lease and commence this action of ejectment: 2 *Inst.*, p. 483; *Bac. Abr.*, tit. *Infancy*, I, 5; 2 *Inst.*, p. 673; *Chambers on Infancy*, p. 441; *Kirton v. Elliott* (c); *Ketley's case* (d). But, assuming that not to be so, the continuance of the ejectment proceedings after Alexander H. Slator attained his full age, and his subsequent adoption of them, were sufficient to avoid that lease, and entitle him to a verdict.

It is submitted that the plaintiff was at liberty to rely on the lease to George W. Slator, for two purposes; first, as evidence of his adoption of the ejectment proceedings; and, secondly, as being in itself an absolute avoidance of the defendant's lease.

(a) 4 Ir. Eq. Rep. 472; S. C., 2 Dr. & War. 307.

(b) *Ubi supra*.

(c) 2 Bulst. 69.

(d) Brown. 120; S. C., Cro. Jac. 320.

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As to the confirmation, it is nugatory as against the present action, being made during the pendency of it: *Thornton v. Illingworth* (a); *Cohen v. Armstrong* (b); *Baylis v. Dineley* (c).

The plaintiff's right to recover must depend on the state of things which existed upon the day on which he has laid his demise; and the subsequent confirmation cannot be set up by the defendant, at least in the present action, to deprive the plaintiff of a title which he had on that day.

Again, after the execution of the lease to George W. Slator, Alexander H. Slator had no estate in him sufficient to enable him to make a valid confirmation of the lease to the defendant.

O'BRIEN, J.

Nov. 25.

In these actions of ejectment, which were tried at the last Longford Summer Assizes (the first before Mr. Justice Christian, and the second before Mr. Justice Ball), we are of opinion that a verdict should be entered in each case for the defendant, pursuant to the liberty reserved by the learned Judges respectively, at the trial. The facts in both cases are identical, so far as they affect the questions which have been raised. I shall refer to those in the first case, which was tried before Mr. Justice Christian. It appears that the defendant Trimble held the lands for which the ejectment was brought (being a portion of the Whitehill estate), under a lease dated the 19th of June 1860, executed to him by the plaintiff Alexander H. Slator, for a term still subsisting, in consideration of a fine of £35, and at the yearly rent of £10. 10s., payable the 1st of May and 1st of November, the said Alexander H. Slator having been, at the time of executing said lease, an infant under twenty-one years of age, and entitled to said Whitehill estate for his life. In January 1861, demand of possession was made on behalf of said Alexander H. Slator, by his uncle, said George W. Slator, and immediately afterwards, on the 24th of January, the present ejectment was brought in the names of said Alexander H. Slator an infant, by said George W. Slator his next friend,

(a) 2 B. & Cr. 824.

(b) 1 M. & Sel. 725.

(c) 3 M. & Sel. 477.

and of said George W. Slator and J. F. Nolan, as co-plaintiffs, stating the title to have accrued on the 23rd of January, which was subsequent to said demand of possession. It does not appear that either of the co-plaintiffs George W. Slator and Nolan had any estate or interest whatever in the lands at, or previous to, the time of bringing the ejectment; and, accordingly, the right to maintain the ejectment, at that time, rested solely on the title of said Alexander H. Slator the infant. The usual defence was filed in February 1861; but plaintiffs did not go down to trial at the then ensuing Spring Assizes. Subsequently to those Assizes, and on the 27th of April 1861, the plaintiff Alexander H. Slator, attained his age of twenty-one years; and immediately afterwards (on the 29th of same month), he executed, to his uncle and co-plaintiff George W. Slator, a lease for his own life and twenty-one years concurrent, of the entire of the Whitehill estate (including the lands in the ejectment), at the rent of £500 a-year. In that lease defendant is named as being in occupation of part of the premises comprised therein; and there is a covenant by said Alexander H. Slator to avoid or determine defendant's lease. It does not appear that any further act was done affecting the rights of the parties until the 14th of June 1861, when said Alexander H. Slator received from defendant the half-year's rent which accrued due on the 1st of May 1861, under defendant's said lease; and at same time executed, by indorsement on defendant's said lease, a confirmation thereof. Plaintiff's Counsel admitted at the trial the due execution of this indorsement, and the *bona fide* payment of said half-year's rent; and it appears by the report of the learned Judge that they made such admission in consequence of the verdict in a third ejectment, brought by the same plaintiffs against Bernard Brady (another tenant of the same estate), which had been previously tried at said Assizes, and in which the validity of a similar payment of rent, and indorsement of confirmation had been impeached by the plaintiffs, but established by the verdict of a special jury. It further appears that, notwithstanding such payment of rent and confirmation, the plaintiffs subsequently proceeded with said ejectment, and served notice of trial for the last Longford

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Summer Assizes. It seems singular, after what had occurred, that this course was adopted, instead of bringing a new ejectment by George W. Slator himself, grounded on the title which he had acquired under his said lease of April 1861. I presume, however, there were sufficient reasons for it; but with those reasons we have nothing to do. Some further evidence was given at the trial (to which I need not refer), and, by arrangement between the parties, a verdict was directed for the plaintiff Alexander H. Slator, with liberty to defendant to move to change such verdict into a verdict for defendant, in case this Court should be of opinion he was entitled to a verdict. A conditional order to that effect was obtained by defendant in the early part of this Term, against which order cause has been shown by the plaintiffs.

Defendant's Counsel contend, first, that when the ejectment was originally brought, none of the plaintiffs (except Alexander H. Slator) had any estate or interest in the lands; and that, with respect to him, the ejectment was not maintainable in his name, as it was brought during his infancy, to defeat and avoid the previous lease of June 1860, which, as against him, was "*voidable*" only, and not "*void*." And further, that this objection to the original proceeding was not remedied by his subsequent adoption and continuance of the ejectment after he attained his full age. And defendant's Counsel contend, secondly, that even supposing such objection not to be a conclusive answer to the ejectment, yet that the subsequent receipt of rent and execution of the indorsement by Alexander H. Slator, in June 1861, after he had attained his full age, amounted, *as against him* (notwithstanding his execution of the intervening lease of April 1861), to a confirmation of said lease of June 1860, and consequently precluded *him* from recovering in the ejectment; and that with respect to any title derived by George W. Slator under said lease of April 1861, it could not avail in the present ejectment, as it was acquired pending the action. Plaintiff's Counsel, on the other hand, contend that the fact of Alexander H. Slator having been an infant when the ejectment was brought did not affect his right to recover therein; and that, at all events, any objection on that ground was removed by his subsequent adoption

and continuance of the ejectment when of full age; and further, that such adoption of the ejectment, and the execution by him of the lease of April 1861 (whereby he conveyed the lands to George W. Slator, and covenanted to avoid defendant's previous lease), amounted to an absolute avoidance and determination of such previous lease; more especially as, by the execution of said lease of April 1861, said Alexander H. Slator was in fact deprived of the power of subsequently confirming defendant's lease. And plaintiff's Counsel also contend that, independently of the effect of this lease of April 1861, the confirmation relied on by defendant was nugatory for the purposes of this action, having been made after action brought; and that it could not, therefore, entitle defendant to a verdict, as the ejectment should be tried upon the state of facts existing when it was brought.

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I shall now state the grounds upon which it appears to me that defendant is entitled to our judgment; and in doing so I shall assume that the fact of plaintiff's having been an infant at the commencement of this action would not be, of itself (as contended by defendant), an absolute bar to plaintiff's right to recover therein, even though he subsequently adopted the proceeding. We have however then to consider what effect the bringing of the ejectment had with respect to defendant's lease. It is settled by several authorities (and has not indeed been controverted during the argument) that such a lease, reserving rent to the infant, though executed by him during infancy, was, *as against him*, not absolutely void, but voidable only; that it was good until it was avoided; and that it could only be avoided at the election of the infant himself, and not at that of the lessee. Can it then be contended that any act of the infant during his minority, either by entering on the lands or bringing an ejectment, would be a binding and conclusive exercise of his power of election, and have the effect of absolutely avoiding the lease? Such a proposition would be wholly inconsistent with those principles upon which the Court acts in dealing with the rights and properties of infants. The principle upon which it is held that an infant should not be absolutely bound by such a lease, executed during his infancy, but

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that it is voidable against him, would also establish that he should not be bound by any act done by him during minority, either in confirmation or avoidance of that lease; but that the power of making his election when he attains full age, and of then avoiding or confirming the lease, as he may think fit, should be preserved to him during the entire of his minority, and that he should not be deprived of such power by any act done by him during that period. This is in accordance with the passage cited from 4th *Bac. Abr.*, tit. *Infancy*, I, p. 374, where it is stated that "Though the infant "may avoid his feoffment by entry during his nonage, yet he cannot "have a *dum fuit infra etatem* till he comes to his full age; for he "is allowed to enter, that he may save to himself the profits in the "meantime; but such entry, being the act of an infant, seems to "be as voidable at full age as his feoffment." It follows therefore that when the plaintiff Alexander H. Slator attained his full age, the lease executed by him to defendant had not been "*avoided*," but was still, as against him, only "*voidable*," with power to him to avoid or confirm it as he might think fit, notwithstanding the previous proceedings in the ejectment. In this state of facts, and omitting for the present any consideration of the lease of April 1861 to George W. Slator, what was the effect of Alexander H. Slator's receipt of rent and execution of the indorsement of confirmation in June 1861? Independent of any question as to the confirmation of defendant's lease, I am of opinion that the very fact of Alexander H. Slator having received the half-year's rent from defendant, up to May 1861, would have disentitled him from recovering in this present action. The ejectment had been brought in January, treating defendant as being then a trespasser; and if plaintiff had succeeded in it he would have been entitled to recover meane rates from defendant as such trespasser, for the entire period which had elapsed from the bringing of the ejectment; and yet, by his subsequent receipt of rent, up to May 1861, he recognises defendant as having been his tenant, and in rightful occupation for several months after the action was commenced. Such receipt of rent by Alexander H. Slator was, I think, a clear waiver by him of any right of entry which he had at the bringing of the eject-

ment. I do not however rest my judgment upon this ground alone, which would affect his right to recover in the present action; because, in my opinion, his receipt of rent and execution of the indorsement, being an absolute confirmation by him of defendant's lease, had relation back to the date of that lease, and rendered it a binding instrument, as against him, from the period of its execution. This retrospective effect of the confirmation was controverted by plaintiff's Counsel, who contended, during the argument, that the confirmation only had effect from the date of the act of confirmation. But the word "*confirmation*," of itself, imports a reference or relation to some former act. In this case, plaintiff's receipt of rent, and execution of the indorsement in June 1861, are not relied on as amounting to a new lease, but as being a confirmation of the previous lease, of June 1860. That previous lease, having been "*voidable only*," was good till it was avoided; and the effect of the confirmation was to preclude its being thereafter avoided, and to render it valid and binding, as against Alexander H. Slator, from its date. The following passage, in 4th *Bac. Abr.*, tit. *Infancy*, L, p. 376, bears upon this point:—"If an infant take a lease for years, of land, rendering rent, which is in arrear for several years, and then the infant comes of age, and still continues the occupation of the land, this makes the lease good and unavoidable; and, by consequence, makes him chargeable with all the arrears incurred during his minority: for, though at full age he might have departed from his bargain, and thereby have avoided payment of the arrears which the lessor suffered to incur during his minority, yet his continuance in possession, after his full age, ratifies and confirms the contract *ab initio*, and so gives remedy for the arrears of rent incurred from the time of the contract made."

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With respect to the objection that the confirmation cannot avail defendant in this ejectment, having been made after action brought, plaintiff's Counsel have relied upon the case of *Thornton v. Illingworth* (a). The facts of that case however are essentially different from those now before us. That was an action for goods sold to

(a) 2 B & C. 814.



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defendant during his minority, for the *purposes of trade*. There was a plea of infancy, and a *replication*, stating that defendant ratified the contract after he came of age; and it was held by the Court that such replication was not sustained in evidence by proof of a promise made by defendant after the commencement of the action. But the Court rested their decision upon the ground that the original contract, being made by an infant for the purposes of trade, was absolutely *void*, and not *voidable only*; and that accordingly they could not apply to the case of such a contract a rule similar to that laid down in cases arising upon the Statute of Limitations, in which it was held that a promise to pay an old debt, though made after the commencement of an action brought for its recovery, would be sufficient to take the case out of the statute, and to sustain the action. Bayly, J., in p. 826, says:—"In the case of an infant, a contract made for goods for the purposes of trade is absolutely void, not voidable only." And again:—"If he makes a promise, after he comes of age, that binds him; on the ground of his taking upon himself a *new liability*, upon a moral consideration existing before. It does not make it a legal debt from the time of making the bargain." And Holroyd, J., says:—"Here there was no legal right, capable of being enforced in a Court of Law, at the time when the action was commenced. Where the Statute of Limitations has run, a new promise revives the debt *ab initio*, and that is equally the case whether the promise is made before or after the commencement of the action." The decision in the case of *Thornton v. Illingworth* is therefore no authority for the plaintiff in the present case. Defendant, on the contrary, might rely on the foregoing extracts from the judgment of the Court, and contend that, as a new promise, whether made before or after the commencement of an action, would revive an old debt "*ab initio*," a similar effect should be given to the confirmation of his lease.

We have next to consider how far the defendant's right to rely on the receipt of rent and confirmation of his lease, by Alexander H. Slator, in June 1861, as a conclusive answer to this action, are affected by the previous lease, of 29th April 1861. And with

respect to this question, I fully concur in the opinion expressed by Mr. Justice Christian, in his report of the trial, where he states "that whatever title the lease of April 1861 might confer upon George W. Slator, as between him and Alexander H. Slator in another proceeding, it could be of no avail for *him* as one of the plaintiffs in the present ejectment, having been executed pending the action; and that, as to Alexander H. Slator himself, he ought not to be allowed to rely on it, in derogation of his own otherwise admittedly valid confirmation of defendant's lease."

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It appears to me that there is no ground upon which this lease can, in the present action, be of any avail to the plaintiffs. I have already observed that when the ejectment was originally brought, the plaintiff George W. Slator had no estate or interest in the lands; and it is clear that, with regard to him, the ejectment could not succeed, by reason of any title which he acquired after action brought. Plaintiff's Counsel, at the trial, apparently acquiesced in this view; as the verdict directed was for *Alexander H. Slator*, on whose title alone the ejectment could have been maintained. Under that lease of April 1861, George W. Slator might have a right of action against Alexander H. Slator, for having broken the covenants contained in it, by his subsequent confirmation of defendant's lease; and he might also bring another ejectment against defendant, grounded on the title which he derived under it; and contend that, as Alexander H. Slator had thereby parted with his interest in the land, he had in fact either absolutely avoided defendant's lease, or had deprived himself of the power of subsequently confirming it. But, in the present action, George W. Slator cannot rely on any such right or title.

With respect then to the plaintiff Alexander H. Slator, it would be manifestly unjust, and at variance with a well-settled principle of law, if, after having received rent under defendant's lease, and executed the indorsement on it, in June 1861 (thus dealing with the land as if he was then the rightful owner of it), he should be allowed to contend that those acts were null and void, upon the ground that he had at the time no right to do them, having previously parted with his estate in the lands, by the lease of

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It is not necessary to refer in detail to the argument on the 204th section of the Common Law Procedure Act of 1853, which provides for the case of an ejectment where the plaintiff's title, though good at the commencement of the action, has expired before the trial; because those provisions are clearly inapplicable to the case where the plaintiff, during the action, has executed a deed putting title out of himself, and then relies on that deed, at the trial, for the purpose of avoiding the effect of his subsequent acts and dealings with the defendant.

We are therefore of opinion that the conditional order, obtained by the defendant Trimble, should be made absolute, with costs, and the verdict entered for him; and that there should be a similar rule in the other case, of *Slator v. Lennon*, the facts of which are substantially the same.

HAYES, J.

A minor is, by the law, regarded as a person of immature judgment; and is, therefore, declared incapable of absolutely binding himself by his contracts; subject however to certain exceptions introduced for his benefit, and which need not here be further noticed. That immaturity of judgment is deemed equally to affect his acts, whatever be his actual age or progress of understanding. In conformity with this general principle, the lease, or contract under seal, by which an infant demises his land, does not absolutely bind him. If the lease reserve a rent to the infant, there is a *prima facie* presumption that the infant has rightly exercised his judgment, weak though it be; and the law, having bound the lessee by his solemn contract, will, as a general rule, and in the absence of fraud, not allow that obligation to be interfered with, or the tenant to be released from his contract, until the infant shall have attained full age; when, by an exercise of his mature judgment, he shall be deemed competent to decide whether both parties shall be bound or both let loose, as he shall elect to

confirm or avoid the lease. This view of the law is founded, I think, not only on sound sense, but on the authorities quoted in *Cole on Ejectment*, p. 584, viz., *Zouch v. Parsons* (a); *Madden v. White* (b); *Drury v. Drury* (c). M. T. 1861.  
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On the other hand, if the infant has parted with his land without any reservation of rent or other recompense, the law presumes there has been an unwise exercise of his understanding, and therefore allows of the act being got rid of, even during minority; for if it were otherwise, the infant, by having parted with his means of subsistence, might be reduced to starvation. Accordingly, any person acting on behalf of the infant, and as his next friend, may at once bring an ejectment and recover possession for the infant, of the land so demised by him.

Such being, as I believe, the state of the law, there has been in these cases a demand of possession and ejectment brought by the infant, acting through his next friend, to recover possession of the lands, notwithstanding the lease of 1860 rendering rent. That instrument was at that time only voidable, and as it could not be avoided until the infant should have attained age, it must be treated as to all intents and purposes a good lease, when the ejectment was brought. And it was not competent for the plaintiff, by any act done, pending the action, and after he had attained full age, to give himself title, for the purposes of sustaining that action. He must, for the purposes of that action, stand or fall by the title which he had at the commencement of the action. The 204th section of the Common Law Procedure Act 1853, plainly conveys that the title to be tried is that which existed at the time of the service of the plaint; and other parts of the Act agree with this.

I am therefore of opinion that the plaintiff had no right to give in evidence the lease of April 1861; and that being out of the way, he cannot resist the defendant's title as shown by the lease of 1860; and which, for all the purposes of this action, must be taken as a still subsisting lease.

(a) *Ubi supra.*

(b) *Ubi supra.*

(c) 5 Bro. P. C. 570.

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plaintiff, he might have shown that this rent was received and confirmation executed under a mistake, in error and ignorance of his rights, or that fraud had been practised on him, or that it was done while he was in a state of intoxication. All these grounds were open to him, and I find that in the first case which was tried, that of *Slator v. Brady*, the plaintiff made three allegations,—that the lease under which the defendant claimed was not only voidable by reason of its having been made by him during minority, but that it was absolutely void on the ground of fraud, as having been procured from him while he was in a state of intoxication; and further, that the receipt for rent and confirmation were also fraudulent transactions, as he had been imposed upon and induced to do these acts under such circumstances that the Court would deem them not binding upon him.

Accordingly, questions were submitted to the jury on all these points, and they found for the defendant on them all, that the transactions between Alexander H. Slator and the defendants were perfectly fair, and that the plaintiff was of capacity to understand, and did understand, the nature of the acts he was doing. In the subsequent cases, the plaintiff did not ask that any questions of the kind should be submitted to the jury, but adopted the previous findings. I asked Mr. *Macdonogh*, in the course of the argument, how the plaintiff (putting aside those questions of infancy and confirmation) could be permitted to allege, as he did, in this action of ejectment, that, at a certain period between the 1st November 1860 and the 1st May 1861, the defendant was a trespasser, wrongfully withholding the possession of these lands, and that, as against him, he (the plaintiff) was entitled to recover, not only the possession of the lands, but also mesne rates and costs, when he (the plaintiff) had, on the 14th June 1861, before any act had been done by him adopting the proceedings in ejectment, by an unequivocal act admitted that the possession of the defendant was rightful, that he was his tenant, holding the possession by right and not by wrong? Well, neither Mr. *Macdonogh* nor any of the plaintiff's Counsel attempted to give an answer to that question. There is no doubt that payment of rent operates as an estoppel, and prevents the

tenant disputing the landlord's title. Estoppels are mutual; but even if they were not so, the law could not allow itself to be made an instrument to aid so gross a fraud, as that Alexander H. Slator should receive this rent and execute this confirmation, being at the time of full age and in full possession of his faculties, and should then turn round and continue this action of ejectment. I may here mention the case of *Croker v. Orpen* (a), following *Doe d. Cheny v. Batten* (b), as very much in point. In the case of *Croker v. Orpen*, a lease for lives renewable for ever was made, subject to a right reserved by the landlord, of resuming possession of 300 acres of the demised premises, in case mines were discovered, upon giving notice to the tenant of his intention to do so. Mines were afterwards discovered, and the landlord served the tenant with the notice required by the lease, and demand of possession was also made. So far, the landlord's title would have been complete, if it had not been for this, that, after service of the notice and demand of possession, he received rent from the tenant in respect of the whole lands. The effect of taking up possession of the 300 acres would have been to make a very slight reduction in the rent. The case went down to trial; and it was contended by the defendant that this act prevented the plaintiff from recovering. The Judge who tried the case directed the jury "that unless they believed the receipt of rent subsequently to the notice was intended as a waiver, they should find for the plaintiff." But, upon a bill of exceptions, it was held that the question did not depend on intention; that the receipt of rent was an unequivocal act, and an answer to the action. So, here, the receipt of rent, for the half-year ending the 1st May 1861, is an act which may be impeached, it is true, but which, if unimpeached, is a conclusive admission that on that day, and for six months previously, the tenant was a lawful tenant, holding the possession by right, and not by wrong.

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On this short ground, which appears to me unanswerable, and considering the manner in which the case has been reserved, I am of opinion that the verdict should be entered for the defendant.

There is another ground on which I concur in the decision of the

(a) 2 Jebb & Symes, 545.

(b) Cowp. 243.

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Court. Assuming the payment of rent out of the case, I still think that this act of confirmation, unimpeached as it was, had a retro-active effect upon the lease, rendering it valid from its commencement. And I think also that the plaintiff, who had put title out of himself on the 29th April 1861, and had done so for his own purposes, should not be allowed to perpetrate such a gross fraud as to recover the costs of this action.

H. T. 1862.  
*Jan. 24, 27.*

OWENS v. VAMHOMRIGH.

An action of contract having been brought, to recover the sum of £109. 10s. 11d., the parties agreed to refer the subject-matter of the action to arbitration; and a submission was entered into, which contained the following provision:—"That the costs of the action, and incident to the consent and award to be made thereon, and of the arbitration, shall abide the result of the said award." An award was made, in favor of the plaintiff, for £18. 10s. 10d.

THIS was a motion on behalf of the plaintiff, by way of appeal from the decision of the Taxing Master, who had certified for only one-half the sum to which the plaintiff's costs had been taxed.

The action was one of contract, and had been brought to recover the sum of £109. 10s. 11d., being the balance claimed by the plaintiff on foot of an account commencing in the year 1852, and ending in the year 1856.

On the 1st July 1861, and subsequently to the filing of the plaint, the matters in dispute were, by consent, referred to arbitration, and a submission was entered into, whereby the subject-matter of the

On taxation, the Taxing Officer refused to allow the plaintiff full costs, as he had recovered a sum less than £20.

On motion, that the Taxing Master be required to review his taxation in that respect—

*Held*, that by the provision with respect to costs, in the submission, the parties had contracted themselves out of the 243rd section of the Common Law Procedure Act 1853;

That the true construction of that provision in the submission was, that the right to full costs should follow the legal result, independently of the amount recovered;

And therefore that the plaintiff was entitled to full costs.

*Wigens v. Cook* (6 C. B., N. S., 784) and *Jones v. Jones* (7 C. B., N. S., 832) followed.

action, and all matters in dispute and difference between the parties, including a claim on the part of the defendant for a set-off, were referred to arbitration; and the submission contained an agreement that the Statute of Limitations should not be set up as a defence, by the plaintiff, to any part of the defendant's set-off; and also that "the costs of the said action, and incident to the said consent and award to be made thereon, and of the said arbitration, *shall abide the result of the said award.*" The arbitrator made up his award on the 12th November 1861, and awarded that the defendant was indebted to the plaintiff in the sum of £18. 10s. 10d., on foot of his demand, over and above all credits of the defendant in respect of his set-off. On the plaintiff's costs coming to be taxed, the Taxing Master only allowed him one-half costs, on the ground that he had recovered a sum less than £20; and that, under the 243rd section of the Common Law Procedure Act 1853, a plaintiff is only entitled to one-half costs when the action is one of contract, and the sum recovered is less than £20.

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*Byrne*, in support of the motion.

The plaintiff's costs should have been taxed on the higher scale. The 243rd section of the Common Law Procedure Act 1853 does not apply to the case of an arbitration under a submission. The words of that section are:—"In case the plaintiff, *in any action* of "contract (except for breach of promise of marriage), shall recover, "exclusive of costs, less than £20 . . . the plaintiff *in any* "such action shall be entitled to no more than one-half of the "ordinary costs."

In *Keene v. Deeble* (a), Lord Tenterden took a distinction between compulsory references and arbitration under a submission; and held that money awarded under the latter was not money *recovered*, within the meaning of the Act of Parliament.—[FITZGERALD, J. That case was under the 43 G. 3, c. 46, s. 3, and was decided on the ground that that statute contemplated a recovery by verdict].—The language of the 43 G. 3, c. 46, s. 3, "shall recover in any such actions," is similar to that of the 243rd section In

(a) 3 B. & Cr. 491.



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the case of *Holland v. Vincent* (a) the same distinction was taken; and Parke, B., there said:—"None of us have any doubt that the "directions to the Master do not apply to the costs of a reference, "but only to the costs of a cause." But assuming that the 243rd section does apply to arbitrations under a submission, the parties here have contracted themselves out of that section, by the provision "that the costs should abide the result of the award." It is submitted that the true construction to be put on that provision is, that the party who should obtain the award in his favor, without reference to the amount awarded, should be entitled to full costs.

*O'Driscoll*, contra.

The words of the 243rd section are large enough to include a case like the present. An *action* has been commenced in this case, and it was by force of that action that this sum was recovered. By the 10th section of the Common Law Procedure Act 1856, parties proceeding under a submission are placed in the same position as "upon "a reference, made by consent, under a rule of Court or Judge's "order." In the latter case, it could not be contended that the 243rd section did not apply. He cited *Molloy v. Jones* (b).

*Byrne*, in reply.

*Falkiner* (*amicus Curiae*) cited *Wigens v. Cook* (c) and *Jones v. Jones* (d).

LEFROY, C. J.

This is an application to the Court to direct the Taxing Officer to review his taxation of the plaintiff's costs. It appears that he has refused to allow the plaintiff full costs, and has certified only for half costs; on the ground that the plaintiff has recovered a sum less than £20. The action was one of *assumpsit*; and, subsequently to the service of the summons and *plaint*, the matter was referred to

(a) 9 Exch. 274; S. C., 17 Jur. 1059.

(b) 1 Ir., N. S., 9.

(c) 6 C. B., N. S., 784; S. C., 28 L. J., N. S., C. P., 312.

(d) 7 C. B., N. S., 832; S. C., 29 L. J., N. S., C. P., 151.

arbitration, and the submission contained a provision that "the costs of the action, and incident to the consent and award to be made thereon, and of the arbitration, should abide the result of the award." There was also an agreement that certain items, in the nature of a set-off, should be taken into consideration by the arbitrator; but the provision, the effect of which we have now to determine, was, as I have said, that the costs should abide the result of the award. Several cases were cited by Counsel, and several *dicta*, which, it appeared to me, there would be some difficulty in reconciling; but, at the close of the argument, our attention was directed to two cases, which were not referred to on either side—namely, the cases of *Wigens v. Cook* (a) and *Jones v. Jones* (b). Upon referring to those cases, it appears that they are distinct authorities upon the construction of the provision contained in the submission; and the meaning to be attached to the words "shall abide the result of the award" seems, from those cases, to be, that the party who, upon the whole award, shall appear to have the result in his favor, without regard to the amount awarded, shall be entitled to full costs. I confess that that would have been my opinion, independently of those cases; for I have always considered that the provisions of the Act of Parliament, which limits the right of the party as to the amount of his costs, was to be construed strictly. I have always thought that a legislative provision, the object of which was to deprive a party of any legal right which he might have, either by the Common Law or by statute, was to be construed strictly; and, unless the case came within the very terms of the Act, that the Court should, upon the well-known rule, which applies to the construction of all statutes which go to deprive the party of an existing legal right, put a strict construction on such a provision, and one in favor of the party sought to be deprived of his right. I think the construction actually put by the Courts upon this provision shows that, with respect to this very Act of Parliament, such was the principle which ought to be adopted in its construction: for though the words of the 243rd section of the Common Law Procedure Act 1853

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(a) *Ubi supra*.  
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(b) *Ubi supra*.  
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expressly refer to what the party shall *recover* in the action, that has never been considered to be the measure of his right to costs; that right has never been measured by a strict reference to the word "recover;" but he has been taken out of the restriction and penal consequences of the statute, by giving to those words "recover in the action" a wide and liberal interpretation. The amount he was entitled to has not been measured by the finding of a jury; but the means by which he has succeeded in recovering it have been held to bring him within, what I may call, the privileges of the statute, and exempt him from its penal consequences. I rest my judgment, not only upon the construction which has been actually put upon this statute in other cases, but upon the general principle, that, when two parties enter into an agreement to submit their case to arbitration, they thereby make a law for themselves; and that it is by the interpretation of that agreement, as a law between them, that the construction and meaning of the submission is to be arrived at. Here the words are "that the costs should abide the result of the award;" and the result has been in favor of the party who now seeks to have full costs. We are of opinion that he is entitled to full costs; and that the Taxing Officer must review his taxation.

O'BRIEN, J.

I concur in the order pronounced by my LORD CHIEF JUSTICE. Whatever doubt might have existed upon the question, if it now arose for the first time, would be removed by the cases of *Wigens v. Cook* (a) and *Jones v. Jones* (b), to which we were referred by Mr. *Falkiner*, as they are express decisions on the same question, under the corresponding English statute; and it is of course desirable that there should be uniformity of decision between the several Courts on the subject. Independent however of those decisions, I think we should have come to the same conclusion, in plaintiff's favor, upon the ground that, by the terms of the consent, the parties have taken the case out of the operation of the 243rd section of the Common Law Procedure Act of 1853 (on which

(a) 6 C. B., N. S., 784.

(b) 7 C. B., N. S., 832.

defendant relies), and have agreed that the liability to costs should be regulated by a different principle. This is not the case of a compulsory reference, under the Common Law Procedure Act of 1856, to which we were referred by defendant's Counsel, but is a reference by consent; and it is clear, from the provision in it (as to defendant's claim of set-off not being affected by the Statute of Limitations), that the parties intended that the result of the action, being referred to arbitration, should be different from what it would have been if it had been disposed of according to the strictly legal rights of the parties. With respect then to the provision in question, that the costs "should abide the result of the award," I think it should be construed as entitling the party in whose favor the award might be made to his costs, in the ordinary manner—that is, to his full costs; and should not be considered as qualified by the 243rd section, which, though the award was in plaintiff's favor, would disentitle him to more than half costs if he recovered less than £20. If the parties intended that the plaintiff's right to costs should be qualified by the amount awarded to him, there might have been a provision to that effect.

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HAYES, J.

It is very satisfactory to think that our judgment in this case is not only sustained by two decisions (a) directly in point, but that it rests on what I conceive to be a sound principle of law—viz., that, when two persons, engaging in litigation, are not satisfied with the law and its tribunals, which the Constitution has provided, but appoint a tribunal for themselves, and agree also to repeal a statute passed for the benefit of defendants,—and thus, as my LORD CHIEF JUSTICE has said, make a law for themselves,—all they can ask us to do is, to interpret the contract by which this has been effected, and as contained in their deed of submission. Accordingly, applying to that contract the ordinary rules which prevail in such cases, we say that the meaning of the parties, to be deduced from the instrument itself, is, that if the plaintiff shall succeed, he is to get

(a) *Wigens v. Cook—Jones v. Jones.*

H. T. 1862. his costs, and if he shall be defeated, the defendant is to have his  
*Queen's Bench* costs.

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FITZGERALD, J.

If it were not for decided cases, I should probably have based my judgment on the broad ground that a plaintiff, who has got an award for £18 only, has failed to recover or obtain (I do not care which) a sum sufficient to entitle him to full costs. If the case were without authority, that would be the broad ground upon which I would be inclined to decide this question; as it does not appear to me to be of any great importance whether the plaintiff got that sum by an award of an arbitrator or by the judgment of the Court: for, in point of fact, he recovered only £18 by means of the proceedings. But this matter has been the subject of judicial decision; and it is not for us now to consider whether the cases to which we were referred might not have stood on better grounds. Their authority is to be respected; and I, for one, think that certainty of decision is best for the public. It appears to me that this case rests upon the construction of this agreement; and I concur with my LORD CHIEF JUSTICE in thinking that, if parties make a law for themselves, to regulate rights which would have been otherwise provided for, all they can ask us to do is, to interpret the agreement by which they have bound themselves.

It has been held, in those two cases to which we were referred by Mr. *Falkiner*, and in other cases to which our attention was not directed, that the meaning of that provision in the submission is, that the right to full costs depends on the legal result of the award; or, as my Brother HAYES has put it, if the plaintiff gets anything by the award, the result is in his favor, and so he is entitled to costs; but, if he recovers nothing, the result is in favor of the defendant, and the latter gets costs. By giving that construction to the words of the agreement we follow decided cases, where the language used by the parties is the same as that adopted here. In the present case, I may point out an additional reason for putting that construction upon those words. The action was one of contract; and the sum sought to be recovered was £109; which was

subject however to considerable cross-demands. It appears that **H. T. 1862.** there was a stipulation that the Statute of Limitations should not be set up as a defence to those cross-demands, and the plaintiff agreed not to rely upon that statute. Now, we cannot fail to observe that, if it had not been for that stipulation, it might have happened that a great part of the set-off would have been covered by the Statute of Limitations; and so the plaintiff might have recovered more than £20, and brought himself within the 243rd section of the Common Law Procedure Act.

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We had a similar question before us, on the 7th November last, in the case of *Murphy v. Flynn* (a), where an application was made to the Court to deprive the plaintiff of his costs. The matter in dispute in that case had been referred to arbitration; and the provision there was, that the costs should follow and abide the event of the award. The plaintiff obtained an award for a sum less than £20, and the Taxing Officer allowed him full costs. There was then an application to this Court, by way of appeal from that decision, and we refused that application, with costs; and, if my recollection does not fail me, it was upon the ground that there were special provisions in the submission, which enabled the arbitrator to take into consideration certain equitable claims; and that by this means the result of the award may have been brought below £20.

I may observe that there are several authorities, not only appearing in the *Law Journal*, but also in the regular *Reports*, not one of which was referred to in argument, either in the present case or in that of *Murphy v. Flynn*.

(a) Not reported.

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Queen's Bench

## TROUSDALE and another v. SHEPPARD and another.

April 28.

A bill of sale, and affidavit annexed thereto, described the attesting witness as—  
 “W. J. Miller, 21 Remington-street Islington, in the County of Middlesex, *now in no occupation.*” The witness had been in the militia, but at the time of the execution of the bill of sale, had no occupation.—*Held*, that this was a sufficient description of the witness to satisfy the requirements of the first section of the Bills of Sale Act (17 & 18 Vic., c. 55).

THIS was an interpleader issue under the 9 & 10 Vic., c. 64. The issue to be tried was:—Whether the goods and chattels set out in a certain bill of sale, dated the 7th of June 1861, were, at the time of seizure, the property of the plaintiffs. The case was tried before the LORD CHIEF JUSTICE during the Sittings after last Michaelmas Term. It appeared that, in the month of May 1861, an action had been brought by the present defendants against a person of the name of Thomas Scott, upon a bill of exchange; and a consent for judgment, given on the 30th of May following, with stay of execution until the 7th of June. On the 27th of June, a writ of *fi. fa.* issued, and, on the 1st of July, the Sheriff, under that writ, seized the goods and chattels, the subject of the present interpleader issue. The plaintiffs gave in evidence at the trial the bill of sale of the 7th of June, whereby Thomas Scott assigned the goods and chattels in question to the plaintiffs, to secure the sum of £1000; and the attestation of the execution of that bill of sale was as follows:—

“Signed, sealed and delivered by the within-named Thomas Scott, in presence of

“W. J. MILLER,

“21 Remington-street, Islington, in the County of Middlesex,  
*“now in no occupation.”*

The affidavit annexed to the bill of sale gave the same description of the witness. The only evidence as to the occupation of W. J. Miller was given by Thomas Scott, who stated that the witness had been in the militia, but at the time of the execution of the bill of sale he believed he had no occupation.

At the close of the plaintiffs' case, an objection was taken to the bill of sale, by the Counsel for the defendants, on the ground that the description of the attesting witness was insufficient, inasmuch as his occupation was not stated, in pursuance of the 17 & 18 Vic., c. 55, s. 1.

This objection the learned CHIEF JUSTICE overruled, and afterwards, in his observations to the jury, told them that, in his opinion, the description of the witness in the bill of sale was sufficient, if they believed that in reality he had no occupation at the time of the execution of the bill of sale.

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At the close of the case, the defendants' Counsel called upon his Lordship to direct a verdict for them, on the ground of the insufficiency of the description of the attesting witness in the bill of sale and affidavit. This his Lordship refused to do; but left the question to the jury, whether the witness had any occupation at the date of the execution of the bill of sale? The jury found that he had no occupation at that time; and brought in a verdict for the plaintiffs.

The learned CHIEF JUSTICE then reserved leave to the defendants to move to have that verdict set aside, and a verdict entered for them, if the Court above should be of opinion that the description of the witness in the bill of sale and affidavit was insufficient.

*T. K. Lowry* and *Dowse*, now showed cause.

Serjeant *Armstrong* and *Macdonogh*, in support of the conditional order.

*T. K. Lowry.*

The only question in this case is, whether the attesting witness was properly described in the bill of sale and affidavit. The first section of the Bills of Sale Act (*a*) requires that every bill of sale made after the passing of the Act, "or a true copy thereof, and "of every attestation thereof, shall, together with an affidavit of "the time of such bill of sale being made or given, and a description "of the *residence and occupation* of the person making or giving "the same, or in case the same shall be made or given by any "person under or in execution of any process, then a description "of the residence and occupation of the person against whom such "process shall have issued, *and of every attesting witness* to such "bill of sale, be filed with the Master of the Court of Queen's

(a) 17 & 18 Vic., c. 55.



E. T. 1862. "Bench in Ireland, within twenty-one days." Here the attesting *Queen's Bench* witness is described as "now in no occupation."

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The evidence was, that the witness had been in the militia; and it is submitted that that is a sufficient description. The provisions of the English (a) and Irish (b) Acts are identical in the requirements as to the description of the person making or giving the bill of sale, and of the witnesses. In *Sutton v. Bath* (c), the assignor of the bill of sale, who had been an assistant to a surgeon, and had also let lodgings, was described in the affidavit as a "gentleman;" it was held there that that was a sufficient description: and that case also decides that the *onus* of proving that the witness had an occupation lies on the party impeaching the bill of sale. In the report of that case, given in *The Law Journal*, Bramwell, B., is represented to have said:—"The question is only as to whether it was necessary for him to describe himself as of some occupation; and you must show that he 'had one:' and again—"As to the word 'gentleman' it may 'or may not have been a true description *per se*, but it is a 'description of addition and not of occupation, it does not hurt, 'and does not amount to a misdescription.'" These observations of Bramwell, B., equally apply to the attesting witness.

"It is argued that the case of *Allen v. Thompson* (d) did not 'apply, because there the person, in respect of whom the description was incorrect, was the assignor. But that argument 'cannot avail, for the same description of residence and occupation is required, and the same words are used with reference 'both to the assignor and the attesting witness; and to hold it 'a description in one respect and not in the other, would be 'contrary to all and every principle of construction.'—*Per Martin, B.*, in *Tutton v. Samoner* (e).

In *Morewood v. The South Yorkshire and River Don Railway Company* (f), Watson, the attesting witness, had been a colliery

(a) 17 & 18 Vic., c. 36.

(b) 17 & 18 Vic., c. 55.

(c) 3 H. & N. 382; S. C., 1 F. & F. 152; S. C., 27 L. J., N. S., Exch., 368.

(d) 1 H. & N. 15.

(e) 3 H. & N. 280.

(f) 3 H. & N. 798.

agent, but at the time of the attestation of the bill of sale was out of employment, and he was described both in the bill of sale and affidavit as "gentleman." It was held there that that was a sufficient description; and Pollock, C. B., said:—"As to the other point, it is not necessary to say what would have been the effect if the bill of sale had been void for want of registration, because the description of Watson was sufficient." And Watson, B.:—"As to the last point, a person who has had an occupation, ceasing to have it, may be well described as a 'gentleman.'" And Bramwell, B.:—"As to the other point, 'no other description could have been given of Watson.'" He cited *Blackwell v. Newbury (a)*.

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Serjeant *Armstrong* and *Macdonogh*.

The description of the attesting witness in this bill of sale and affidavit is not sufficient. The words of the Bills of Sale Act express that the residence and *occupation of every attesting witness* to a bill of sale must be given. The cases cited by the plaintiff prove nothing more than that the description given there satisfied the requirements of the Act; they are no authority for what the plaintiff contends for here, namely, that a description that the witness has no occupation is sufficient. In *Pickard v. Bretz (a)*, though the question was, whether a defect in the affidavit could be cured by reference to the bill of sale, the judgments of all the Members of the Court went on this ground, that a description of the occupation of the attesting witness was essential.—[FITZGERALD, J. Does the Act of Parliament require that there should be an attesting witness to the bill of sale at all?—There is no express provision to that effect; but it is a necessary inference, from the words of the first section, that there should be an attesting witness to every bill of sale.—[FITZGERALD, J. Your argument would go to this, that no one could be an attesting witness to a bill of sale unless he had an occupation.]—It is admitted that the defendant must go that length. The object of the Act of Parliament was to prevent secret assignments of property, and one of the means

(a) 8 El. & Bl. 549.

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(b) 5 H. & N. 9.

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E. T. 1862. of carrying out that object was, to require as an attesting witness  
*Queen's Bench* to every bill of sale, a person whose description should be such,  
 TROUSDALE that parties would be enabled to find him readily. In *Dryden*  
 v. SHEPPARD. v. *Hope* (a) and *Tutton v. Sanoner* (b), the description of an  
 attorney's clerk as a "gentleman" was held insufficient. They  
 cited *Hutton v. English* (c).

*Dowse*, in reply.

The construction put by the defendant on this statute is an unreasonable one; it amounts to this, that no one can be an attesting witness to a bill of sale unless he has an occupation. The plaintiffs' construction is much more simple and natural, namely, that the first section of the Act should be read as if the words "if any" were inserted after the word "occupation," wherever it occurs.

LEFROY, C. J.

We are all of opinion that the objection to this bill of sale is unfounded. The question is a most important one; it turns upon the construction of the Bills of Sale Act, the 17 & 18 Vic., c. 55.

Now, what may we fairly say was the object of the Legislature in passing this statute, which requires bills of sale of a particular description to be registered? Can it be said to have been anything more than this, that the public should have an opportunity of knowing everything that passed, or could be made to appear, by the bill of sale, as fully as if the bill of sale itself was before them? It might be said that the statute does not require a witness to a bill of sale at all; but, assuming a witness to be necessary, does it require any qualification whatever for him? It does require that whatever the bill of sale contains should appear as fully as if the deed itself were before the public, that the public should have an opportunity of knowing, from the registry, everything that might appear from the deed itself. If therefore there are witnesses to the bill of sale, and they have a description or occupation, and if that

(a) 3 L. T., N. S., 280.

(b) 3 H. & N. 280.

(c) 7 El. & Bl. 94.

would appear by the deed, all those are matters which should be inserted in the affidavit. But are we to give an enlarged operation to a statute, abridging the Common Law right of every man to dispose of his property? Are we, where restrictions are imposed by the Legislature upon that Common Law right, to carry out a statute, so abridging that right, beyond what is absolutely necessary to give effect to its provisions? The rule is, that a statute abridging a Common Law right should be strictly construed, and that a party should not be required to do, or forbear from doing, anything but what is clearly set out in the statute. Upon that principle of the Common Law, I told the jury that if this party (there being no qualification in the statute as to who might or who might not be a witness) had a residence or occupation, that should be given, in order that the public might have the benefit of that description, but not further. The statute does not require anything with respect to the qualification of the witness. What it does require is, that whatever description is given of him in the deed, that should be transferred into the record of the deed, in order that the public should have the benefit of it. I therefore ruled, upon the well-known maxim of the Common Law, "*Lex neminem cogit ad impossibilia*," that if the witness had no occupation, it was not necessary that it should be given. If the deed itself did not contain any description of the occupation, and if the witness had no occupation, it could not be inserted in the affidavit. The law does not require that which is impossible to be inserted.

Upon those principles of the Common Law, therefore (for I had not before me, at the trial, those cases which have been cited during the argument), I left to the jury the question whether it was possible to have inserted in this bill of sale the description, the want of which was said to be a defect fatal to its validity. The jury found that it was not possible to have such description inserted, as the witness had no occupation; and therefore I was of opinion that it was not requisite. The Act of Parliament did not require it; there was no occupation mentioned in the bill of sale; and therefore there could be none in the affidavit. This was not a case of the affidavit withholding or falsifying anything in the bill of sale.

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SHEPPARD. I agree, that if the party had an occupation, and if that was not fairly given by the deed, and transferred into the copy and affidavit, that would be an objection: but where there was a negation that anything of the kind existed, the want of it is no objection. To hold such a description to be necessary, would be to make a law restricting the party's Common Law right, and affecting the disposition of his property. The principle upon which we should, in my opinion, now act is this, that, where the Legislature has abridged a Common Law right of the subject, we should not go beyond what the Legislature has clearly and expressly required. I do not think the cases which have been referred to in the least interfere with that principle. If there were a plain authority on the point (whatever doubt I might feel in principle), I should consider it my duty to follow that decision. But I think the tendency of the cases is very much to give effect to the principle to which I have adverted—namely, that a statute affecting a Common Law right of the subject is not to be carried beyond what the words fairly bear, or the necessary inference to be drawn from them.

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H. T. 1863.  
*Common Pleas*

## DELMER v. M'CABE.

(*Common Pleas*).

Jan. 27.

**ACTION OF COVENANT.**—The statement of the cause of action in the first paragraph of the summons and plaint was, that the defendant, by deed made the 1st of March 1862, between the defendant and plaintiff, reciting that the defendant was seised of a tenement, with the appurtenances, in Liffey-street, in the city of Dublin, under a certain indenture of conveyance of the 17th of July 1841, for the considerations therein mentioned, granted to the plaintiff, his heirs and assigns, the said tenement, with the appurtenances, together with all the estate and inheritance of the defendant therein, to hold to the plaintiff, his heirs and assigns for ever. And the defendant did, by said deed, covenant with the plaintiff that he (the defendant) then had good right, full power, and lawful authority to make that conveyance of his (the defendant's) estate and interest under the said conveyance of the 17th of July 1841, to the plaintiff, his heirs and assigns; whereas the plaintiff alleged that the defendant had not then any right, power or authority to make any conveyance to the plaintiff and his heirs, of any estate or interest in the said premises: and for a further breach, the plaintiff said, that the defendant had not then any right, power or authority to make any conveyance for ever, of any estate or interest in the said premises: and for a further breach the plaintiff said, that the defendant had not then any right, power or authority to make any conveyance of any estate of inheritance in the said premises.

**Defence.**—That by indenture dated the 17th day of July 1841, and made and executed between and by one Catherine Darcy of the one part, and the defendant of the other part, after reciting that the

had power to convey a freehold estate, but only that he had power an estate as he took under the said deed.

Where a deed of assignment, after reciting that under a certain deed A was seised and possessed of certain premises, and that he had agreed with the plaintiff for the sale of all the defendant's estate and interest under the same deed, to the plaintiff, witnessed that the defendant did grant, &c., and assign unto the plaintiff, the premises, to hold same to him, his heirs executors, &c., for ever; and also contained a covenant that the defendant then had in himself good right, full power and lawful authority to make that conveyance of his estate and interest under the said deed to the plaintiff, his heirs, executors, &c.—*Held*, that this was not an absolute covenant that A to convey such

H. T. 1863. *Common Pleas* said Catherine Darcy was then seised and in possession of a small dwelling-house and premises in Lower Liffey-street, in the city of Dublin (being the house and premises in the said first paragraph mentioned), for the period of seventeen years from the date thereof, then last past; and that the said Catherine Darcy had agreed to sell and assign all her right, title and interest in the said dwelling-house and premises, for the sum of £3. 10s., unto the defendant, his heirs, executors, administrators and assigns; the said Catherine Darcy did, in consideration of the said sum of £3. 10s., then paid to her by the defendant, grant, bargain, sell and assign to the defendant, his heirs, executors, administrators and assigns, the said dwelling-house and premises, to have and to hold the same unto the defendant, his heirs, executors, administrators and assigns, together with all and singular the rights, members and appurtenances thereunto belonging, or in anywise appertaining, for ever. And the said Catherine Darcy did, by the same deed, covenant with the defendant that he, the said defendant, his heirs, executors, administrators and assigns, should and would, from time to time, and at all times for ever thereafter, peaceably and quietly have, hold, occupy, possess and enjoy the said dwelling-house and premises, and have, receive and take the rents, issues and profits thereof, without the let, suit, hindrance or interruption, or denial of her the said Catherine Darcy, her heirs, executors, administrators or assigns, or of any other person or persons claiming or deriving by, from or under them, or any of them; and the defendant averred that he became entitled to and entered into the possession of said house and premises under the said last mentioned indenture, and not otherwise, and continued in such possession until the execution of the indenture next hereinafter mentioned; and that by deed dated the 1st day of March 1862, made between the defendant and the plaintiff, being the deed in the said first paragraph mentioned, after reciting that by indenture of conveyance, dated the 17th of July 1841, being the indenture thereinbefore stated, the defendant was seised and possessed of the premises thereafter mentioned, being the premises in the said first paragraph mentioned; and that the defendant had contracted and agreed with the plaintiff for the sale of all his (the said defendant's)

estate and interest under the said conveyance of the 17th of July 1841, to the plaintiff, the said defendant did grant, bargain, sell and assign unto the plaintiff, his heirs, executors, administrators and assigns, the said dwelling-house and premises, to hold the same unto the plaintiff, his heirs, executors, administrators and assigns for ever. And the defendant did, by the same indenture, covenant with the plaintiff that he (the defendant) then had in himself good right, full power, and lawful authority to make that conveyance of his estate and interest under the said conveyance of the 17th of July 1841, to the said plaintiff, his heirs, executors, administrators and assigns. And the defendant averred that the plaintiff, immediately upon the execution of the said last-mentioned indenture of the 1st day of March 1862, entered into possession of, and became and was entitled to, the said house and premises, under and by virtue of the said last-mentioned indenture. And the defendant averred that he had, at the time of the entering into by him of the said covenant in the said last-mentioned indenture contained, good right, full power, and lawful authority to make the said conveyance of his estate and interest, under the said conveyance of the 17th of July 1841, to the plaintiff, his heirs, executors, administrators and assigns, as in the said covenant contained.

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Demurrer:—"Because it does not thereby appear that the defendant, at the time of the conveyance of the 1st March 1862, "had any estate of freehold, or any estate in the premises; and "because the averments contained in said defence, even if true, "afford no answer to the cause of action in respect of which same "have been pleaded; and therefore the plaintiff demurs to said "defence."

*Samuel Ferguson* (with him *W. J. Sidney*), in support of the demurrer, referred to the following cases:—*Cooke v. Fowndes* (a); *Jones v. Davies* (b); *Lainson v. Tremere* (c); *Bowman v. Taylor* (d); *Stott v. East* (e); *Bradshaw's case* (f); *Doughty v.*

(a) 1 Lev. 40.

(b) 5 Har. & N. 766.

(c) 1 A. & E. 792.

(d) 2 A. & E. 278.

(e) 16 East, 343.

(f) 5 Rep. 606.



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*J. E. Walsh* and *Tandy*, contra, cited *Browning v. Wright* (d); *Howell v. Richards* (e); *Foord v. Wilson* (f); *Sugden's Ven. and Pur.*, last ed., pp. 605, 606; 2 *Smith's Lead. Cas.*, p. 705; 10 *Vin. Abridg.*, tit. *Estoppel*, pp. 5, 9, 15, and 16, M. 7; *Broughton v. Conway* (g); *Wright d. Jeffreys v. Bucknell* (h); *Kepp v. Wiggett* (i).

*Cur. ad vult.*

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 May 1.

This case came before the Court on a demurrer, taken by the plaintiff to the first defence pleaded by the defendant to the first count or paragraph of the summons and plaint. It is necessary to state in detail the pleadings on which the question arises.—[His Lordship read them.]—On these pleadings, the contest between the parties is this:—The plaintiff alleges that, by the covenant contained in the deed of March 1862, the defendant covenanted with him that he (the defendant) had power and authority to convey to the plaintiff and his heirs, either an estate in perpetuity, or some estate of inheritance, or, at all events, an estate of freehold; and he alleges that he had not power or authority to grant any such. Defendant, on the other hand, alleges that such is not the true construction of the covenant entered into by him. He says he only covenanted that he had authority to grant whatever estate or interest he derived under the deed of 1841, and that he had such power and authority; that he accordingly granted it; and that therefore he is not responsible, though the interest which he so granted should turn out to be the residue of a term of years, or any other interest which expired immediately after the execution of the deed of March 1862. It

(a) 1 Saund. R. 214.

(c) 4 M. & S. 265.

(e) 11 East, 633.

(g) 2 Dyer, 240.

(b) Cro. Jac. 375.

(d) 2 B. & P. 13.

(f) 8 Taunt. 543.

(h) 2 B. & Ad. 284.

(i) 10 C. B. 53.

will be observed that plaintiff does not allege that no estate passed by that deed. His allegation is only that no freehold estate passed thereby. The deed of the 1st of March 1862 is correctly set forth in the defendant's plea; but, in accordance with our decision in previous cases, we have felt at liberty to refer to the deed itself, a copy of which has been supplied by the parties. Plaintiff's argument is, that as the deed of March 1862 recites the deed of July 1841, and contains a statement that under that deed the defendant was seised and possessed of the premises in question, and purports to convey same to the plaintiff, his heirs, executors, administrators and assigns for ever, that the true construction of the covenant—that the defendant had power to make that conveyance of his estate and interest under the deed of July 1841—is, that the defendant had an estate in fee, or, at all events, a freehold estate, which could be conveyed to the plaintiff and his heirs: and several cases have been cited to prove that the short legal meaning of the word “seised” is, being in possession of a freehold estate, and that a party to a deed is estopped from denying the truth of matters recited in it. No doubt, these two propositions are quite accurate in the abstract; but what their application is to the question before us, I have not been able to understand. But, be this as it may, the whole argument is based on the supposition that the true construction of the recital is, that the defendant was seised of a freehold estate. And to give effect to the word “possessed,” it has been suggested that the recital means he was at the same time seised of a freehold estate and possessed of a chattel interest in the premises in question. Every one conversant with the law of real property knows that a party, under very special circumstances, may be possessed of a chattel interest and seised of a freehold interest, which will not merge; but I confess I feel very great difficulty in coming to the conclusion that the person who prepared this conveyance, or the parties who executed it, ever heard of the doctrine in question; nor do I at this moment see clearly how same could well exist in the case of a conveyance such as that recited, from Catherine Deering to the defendant. In the event of the Court not adopting this construction of the recital in question, it has been

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suggested that the meaning may have been that the plaintiff was seised of a freehold estate, and in possession under it. The answer to this is, that such would be the effect of the word "seised" alone; the meaning of the word "seised" being, in possession of, or under, a freehold estate. But it may then naturally be asked, what is the meaning of the recital in question? I confess I entertain very little doubt but that the true meaning is, that the parties did not know what estate or interest the defendant had in the premises, and that the recital is used to cover any estate he may be found to have had. It appears, from the deed of February 1862, that defendant's title was a conveyance, by Catherine Deering, to him, his heirs, executors, administrators and assigns, without specifying what estate was thereby conveyed to him. The deed of 1862 does not contain any statement of a seizure in fee-simple, or of any specific estate of freehold; as it, in all probability, would, if the parties knew that the defendant was seised of any particular estate. The contract recited in the deed of 1862 is not for the purchase of an estate in fee-simple, or of any specific quality or duration, but for defendant's estate and interest under the conveyance of July 1841; and, following this recital, the conveyance is to the plaintiff, his heirs, executors, administrators and assigns, for ever,—words sufficiently large to convey the property to the plaintiff and his heirs should the title turn out to be fee-simple or freehold, and to him and his personal representatives should it be a chattel interest. And, in further accordance with the suggestion I have made, there is no covenant that the party is seised in fee-simple, or of any estate whatever; as is, to say the least of it, generally found in the conveyance of an estate of fee-simple; or that he has power to convey a fee-simple as for a freehold or any particular estate; but that he has good power to convey his estate and interest under the deed of 1841: saying, as I read it, almost in so many words—"I do not know what estate I have under the deed of 1841; whether it is freehold or chattel; but, whatever it is, I give it to you as I have got it: I have not done any act to dispose of it or incumber it; and, such as it is, I sell it to you." But then, of course, the question remains, are we at liberty to give that construction to

the recital in question? I consider it to be a well-settled rule of construction of deeds, as well as of wills and all other instruments, that if the Court can, from the whole of the instrument, be satisfied of the intention of the parties, and that to effectuate that intention it be necessary, to read "or" instead of "and," or *vice versa*, that it is quite competent for the Court to do so. And, speaking for myself, I am so satisfied in this case, from the whole of this deed, that the defendant never intended to assert as a matter of fact that he was seised of a freehold estate, and possessed of a chattel interest in the premises in question. If it were necessary, for the decision of the case, to hold that the words "seised and possessed" should be read "seised or possessed" of the premises in question, I would be quite prepared to do so; and if such could be done, all difficulty in the case would cease, and the covenant would be satisfied by a conveyance of a chattel interest in the premises in question. But we do not think it necessary to decide the case on this ground. Let me suppose that there is in fact a mistaken recital in the deed of March 1862 that, under the deed of 1841, the defendant was seised in fee or of freehold in the premises in question, followed by the conveyance and covenant in the deed in question, I deny that the true construction of the deed would be as contended for by the plaintiff. As correctly observed by *Lord St. Leonards*, in the 2nd volume of the treatise on *Vendors and Purchasers*, p. 526, in commenting on the case of *Johnson v. Proctor*—"No recital that a party was seised in fee or otherwise would amount to a general warranty that he was so seised." We are quite aware that some words of conveyances, such as the word "demise," contains an implied warranty that the grantor has power to grant the estate expressed to be demised. And some doubt having arisen whether the word "grant" did not contain a similar warranty, it is expressly enacted by the 4th section of the 8 & 9 Vic., c. 106, that the word "grant," in a deed executed after the 1st of October 1845, shall not imply any covenant at law, except in cases where, under any Act of Parliament, the word "grant" shall imply a covenant: so that even if the recital was in terms that the defendant was seised in fee-simple under the deed

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of 1841, still the question would be, what would be the true construction of the covenant that the defendant had authority to make that conveyance of his estate and interest under the deed of July 1841 to the plaintiff, his heirs, executors, administrators and assigns? Where the question is, what is the construction or meaning of a particular covenant, I do not attach much importance to cases, unless where, as in the ordinary covenants for title, particular words have received a known and settled construction; in such cases the settled construction must be adopted: but where that is not the case, the duty of the Court is to ascertain the intention of the parties from the entire instrument, and for that construction which will but effect such intention.

The only case having any resemblance to the present, to which we have been referred, is *Cook v. Fownds* (a). Plaintiff declares that the defendant bargained and sold to him certain lands, which he had purchased of Wollaston and others, trustees for the sale of defendant's estates, and covenanted that he was seised of a good estate in fee, according to the indenture made to him by Wollaston and others; and assigns, as breach, that he was not seised in fee: defendant pleaded, as here, that he was seised of as good an estate as Wollaston conveyed to him; plaintiff demurred, and had judgment, the Court holding that the covenant was absolute; that he was seised in fee: and the reference to the conveyance by Wollaston seemed only to denote the limitation and quantity of the estate, and not the defeazableness or undefeazableness of the title. It does not occur to us that this case has any application to the case before us, in which the statement or recital is, not that the party is seised in fee, but that he is seised and possessed; where the contract is not for the purchase of an estate in fee or freehold, but of the estate and interest of the defendant under the deed of July 1841; and where the covenant is, not that he has power to convey a fee, but to make this conveyance of his estate and interest under the deed of July 1841, followed by a covenant for quiet enjoyment against acts by the defendant himself.

On the whole therefore we are of opinion, that the construction

(a) 1 Lev. 40.

of the covenant in question is that contended for by the defendant, and not that asserted by the plaintiff; and therefore, that we must overrule the demurrer taken by the plaintiff to defendant's plea. But of course this decision does not interfere with plaintiff's right to recover on the other counts of his summons and plaint, if the defendant, knowing that he had only an estate about expiring, fraudulently represented to the plaintiff that he had a large estate or interest in the premises, to induce him to become the purchaser thereof; we merely decide that by the covenant in the deed of February 1862, the defendant merely covenanted that he had power to convey what he took under the deed of 1841; but that he did not covenant that he had any fee-simple or freehold estate thereunder.

Plaintiff's demurrer to defendant's plea must be overruled, and judgment given for defendant.

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LOCKHART v. THE IRISH NORTH-WESTERN  
RAILWAY COMPANY.

T. T. 1863.

May 28,  
June 12.

THIS was an action for negligence. The statement of the cause of action in the first count of the summons and plaint was substantially that the defendants were the owners and proprietors of the Dundalk and Enniskillen Railway, which was authorised to be constructed by a certain Act of Parliament, made and passed after the passing of "The Railway Clauses Consolidation Act 1845," the provisions of which applied to the said Railway; and that although the defendants, under the provisions of the statutes

To an action brought against a Railway Company for negligence in maintaining fences, by reason whereof the plaintiff's cattle were injured, the Company pleaded that they had constructed their works in con-

formity with the award of the public arbitrator, appointed in pursuance of the provisions of the Railways Act (Ireland) 1851; and had since maintained same accordingly.—*Held*, that the plaintiff ought to have objected at the time to said award, if dissatisfied therewith, and could not complain of the want of accommodation works not provided for thereby.

*Held also*, that a general averment in the defence, of the authority of the arbitrator, was sufficient, within the 67th section of the Common Law Procedure Amendment Act 1853.

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in such case made and provided, purchased and took land for the use of said Railway, including certain land formerly in the possession of the plaintiff; and although all things happened, &c., to impose upon the defendants the liability to make, and at all times thereafter maintain, and it became and was the duty of the defendants to make, and at all times thereafter maintain, sufficient posts, rails, hedges, &c., for separating the lands so taken for the said Railway from the adjoining lands not taken, and for protecting the cattle of the owners or occupiers of such adjoining lands from straying thereout, by reason of said Railway; yet the defendants, disregarding their duty in that behalf, did not maintain sufficient fences for the purpose aforesaid, but wholly omitted and neglected so to do; and, on the contrary, the defendants, carelessly, negligently, and improperly suffered and permitted the lands so taken for the use of the Railway to be, and the same were, for a long time, and until the injuries therein mentioned, without any sufficient fence or fences for separating the same lands from the adjoining lands, and for protecting the cattle of the owners or occupiers thereof from straying thereout. It is then averred that for want of same, and by reason of the negligence of the defendants in that behalf, a horse of the plaintiff's strayed from the adjoining lands unto and upon the said Railway, and was run down by a train of the defendants, and was thereby killed, to plaintiff's damage, &c.

In the second count the plaintiff complained that, before and at the time of the making of the defendants' Railway, the plaintiff was possessed of a farm of land situate at Lyslynchahan, in the county of Monaghan, through which a small drain or rivulet ran, or was used to flow; and that the defendants afterwards became the owners of the Dundalk and Enniskillen Railway, which was constructed under an Act of Parliament, incorporating therewith the provisions of the Railway Clauses Consolidation Act 1845; and that said Railway ran and still runs through a portion of said land of the plaintiff, taken by the defendants for the use of said Railway, and crossed the said drain or rivulet running through the said lands of the plaintiff; and the plaintiff averred that all

things accrued, &c., necessary to impose upon the defendants the liability, and it became and was their duty, to make and maintain all necessary culverts, of dimensions sufficient to convey the waters of said rivulet, as clearly from the lands of the plaintiff lying near or affected by the Railway, as before the making; and although the defendants did construct a culvert for such purpose, yet they did not, in the construction thereof, use proper care and skill; but negligently, improperly and insufficiently made and constructed said culvert, and that same, shortly after its construction, became choked up, &c.; and, as a further breach of the defendants' duty, it was alleged that they did not maintain any sufficient culvert, and that by reason of such negligence and breach of duty of the defendants, the water of the said rivulet overflowed the lands of the plaintiff, whereby same were injured, &c.

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The defendants pleaded to the first count, in effect, performance of the duty imposed on them respecting the fences, and that the plaintiff had sustained the injuries complained of through his own wrong. They pleaded also a further defence to the first count—that it was not their duty to make or maintain any posts, hedges, fences, &c., for separating the lands, &c., because such works were accommodation works within the meaning of the statute in that case provided; and that while the plaintiff was the occupier of the said land taken by the defendants for the use of the Railway, and before said lands were taken by them, and before the happening of the injuries complained of, Mr. P. B., who was duly appointed arbitrator, by the Commissioners of Public Works in Ireland, in pursuance of the Railway Act Ireland 1851, the provisions of which extended to the Dundalk and Enniskillen Railway Act 1852, duly made and published his award, whereby he awarded and directed the works which should be made and maintained by the defendants, for the accommodation of the lands adjoining the said Railway, in the several townlands in the county of Monaghan; and in some of which the said lands required and taken by the Railway, and also the adjoining lands not required or taken, were situate; which said award was not traversed in respect of the said works, and which were, before the happening of the injuries complained of, duly made and executed, and have



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since been maintained, &c., in pursuance of said award, which was the only award ever made by anyone respecting any of said townlands; and which did not direct the making or maintaining of any posts, hedges, fences, &c., for separating the lands so taken for the said Railway from the adjoining lands not taken, &c. This plea contained a further statement that the plaintiff, agreed to receive, and was paid, a certain sum in satisfaction of all claims which he might thereafter have for accommodation works, consequential damages, &c. To the second count, the defendants pleaded defences similar to those pleaded to the first count. To the second defence to both counts, the plaintiff replied and demurred. The grounds of the demurrer were, that the several allegations in the defence contained amounted to the pleading of evidence to sustain an inference of law sought to be raised by the defence, which inference of law did not arise from the allegations of fact therein contained; and because, by said defence, the defendants had not traversed and denied, nor confessed and avoided, any material averment in the plaint; but introduced and attempted to put in issue matters of fact not alleged, nor necessary to be alleged, and upon which no material issue could be taken, &c., &c.

*Frazer and Macdonogh*, were in support of the demurrer.

*W. Boyd*, and *J. E. Walsh*, contra.

The following cases and Acts of Parliament were referred to during the argument:—*Ricketts v. The E. & W. India Docks and B. J. Railway Co.* (a); *The M., S. & W. Railway Co. appts.*, *Wallis and anor. respts.* (b); *Bessant v. The G. W. Railway Co.* (c); *Marfell v. The South Wales Railway Co.* (d); *Lawrenson v. Gt. W. Railway Co.* (e); *M'Taggart v. Ellis* (f); *Paley on Convictions*, pp. 139–40; 1 *Chitty on Pleading*, 5th ed., p. 271; *Picton v. Gaskin* (g); 14 & 15 *Vic.*, c. 70, ss. 4, 5, 8 and 9; 5 & 6 *Vic.*, c. 55, s. 10; 8 *Vic.*, c. 20, ss. 25, 68; 16 & 17 *Vic.*, c. 113, s. 67.

*Cur. ad vult.*

(a) 12 C. B. 160.

(c) 8 C. B., N. S., 368.

(e) 6 Q. B., N. S., 643.

(b) 14 C. B. 213.

(d) 8 C. B., N. S., 525.

(f) 4 Bing. 114.

(g) 2 H. & Br. 247.

MONAHAN, C. J.

This case comes before the Court on a demurrer to the second defences, filed respectively in answer to the first and second counts of the summons and plaint—[His Lordship stated the first and second counts].—Both of these refer to the same section (68th) of the Railways Consolidation Act 1845. That section is as follows—[His Lordship read it].—There can be no doubt that, under that enactment, the Company would have been responsible for making and maintaining fences for the purpose of separating the lands so taken for the Railway, from the adjoining lands. But then the Railway Company say that, subsequently to this Act, another Act of Parliament was passed (the 14 & 15 Vic., c. 70), and accordingly they have pleaded the defences in question, grounded upon that Act—[His Lordship read the defences].—The substance of both these defences is, a denial of the general averment of the duty alleged in the summons and plaint, and of any special agreement whereby the defendants might otherwise have become liable to construct these works; and an allegation that the arbitrator appointed by the Board of Works duly made his award, which did not direct the making of the accommodation works in question; and they insist that consequently the plaintiff has no right to complain of any injuries resulting from the non-execution of these works. The validity of these defences depends upon the construction of the sections of the 14 & 15 Vic., c. 70, applicable to the present case. The 4th section of that Act requires the Company to “cause to be made, &c., maps or plans, and schedules of the lands so required,” and also of the works which the Company propose to make and maintain “for the accommodation of “lands adjoining the Railway, and for compensation in lieu of which “the Company shall not have contracted.” These plans are to be deposited at the offices of the Commissioners of Public Works, with the Clerk of the Peace, and the Clerk of the Board of Guardians. Section 5 provides that the Board of Works shall appoint an arbitrator between the Company and the persons interested in the lands to which such maps or plans, schedules and estimates relate. By section 8, notice is to be published of the

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appointment of the arbitrator, and requiring persons claiming to have any works done by the Company, for the accommodation of lands adjoining the Railway, to deliver in their claims to the arbitrator. Then, by section 9, the arbitrator, amongst other things, is to "inquire and determine what works should be made and maintained by the Company, for the accommodation of lands adjoining the Railway;" "and the arbitrator shall, after due inquiry and examination, frame a draft award, setting forth," &c. &c., "and the works to be made and maintained by the Company, for the accommodation of lands adjoining the Railway," &c. The section then goes on to provide for notice to be given of the making of the draft award, to all parties interested, who shall have an opportunity for making objections thereto; "and when the arbitrator has heard and determined all such objections, and made such inquiries as he may think necessary in reference thereto, and made such alterations as he may deem proper in the draft award, he shall make his award, under his hand and seal, accordingly; and every such award shall be binding and conclusive, subject to the provisions concerning traverses hereinafter contained, upon all persons whomsoever; and no such award shall be set aside for irregularity in the matter of form." The effect of this enactment therefore is, that it is the duty of the Company to specify, in the map and schedule, all the accommodation works which they shall deem necessary; and it is also the duty of all the parties interested to see that all they require is set out in the map; and in case they object to the plans and schedules in any respect, they are bound to make their claim accordingly, and the arbitrator is to investigate that claim, and to make his award thereon. This enactment contains an express provision for the making and maintaining of works for the accommodation of adjoining premises; but then its provisions amount to this, that when the award is made, without directing the making of such works, the Company is not bound to make them, and incur no liability by reason of their *non-execution*. No doubt, the Railways Clauses Act 1845, s. 68, contains a general provision for making "convenient gates, bridges, arches, culverts, and passages," &c. &c.; but then it is the duty of the party in-

terested, when he sees the plans, to satisfy himself that all necessary works are included in them; and if any accommodation works he considers necessary are omitted, it is his duty to go before the arbitrator, for the purpose of getting him to set the matter right; and in case the arbitrator decide against him, then he has to go before the Judge and jury, upon a traverse of the award; but that award, except in such respects as it has been altered by the finding upon a traverse, is conclusive of the rights of the parties for all future time. Therefore, if the award in the present case be properly made, and so shown by the pleadings, it is a good answer to the present action. But then Mr. *Macdonogh* has argued, and cited cases, for the purpose of showing that where a party relies on the judgment or award of an inferior Court, he is bound to state, in his pleading, facts and circumstances tending to show the existence of jurisdiction on the part of such tribunal; and he has insisted that the present defences do not contain the needful averments. I may confess that for some time I thought that the plea was defective in this particular; but we have since been referred, by Mr. *Boyd*, to the 67th section of the Common Law Procedure Amendment Act 1853, which provides that—[His Lordship read the section].—The only question therefore is, whether this award was the adjudication of a Court or officer, within the meaning of that Act. Here the arbitrator was appointed for general purposes, according to the Act of Parliament to which I have already referred; and he had jurisdiction thereunder to make an award binding on all parties. We have no doubt therefore that, though this particular case might not have been within the contemplation of the Legislature when passing the Common Law Procedure Act, still that the arbitrator was an officer coming within the words and meaning of the Act to which I have referred; and are therefore of opinion that the award was properly pleaded in the present case, and that the plaintiff is not entitled to have these accommodation works the want of which he complains of. We must therefore overrule the demurrers, and give judgment in favor of the defendants.

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*Queen's Bench*

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 GRAND JURY OF THE COUNTY OF MAYO,  
 at the Spring Assizes 1861.

Nov. 13.  
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Writs of *certiorari* are granted, not as matter of right; but in the exercise of a sound judicial discretion. On the last day of Trinity Term 1861, the Court granted a conditional order for a writ of *certiorari* to remove ten presentments, made and passed by the Grand Jury of the county of Mayo, at the Spring Assizes in 1861, in order that they might be quashed as illegal, irregular, and void; because the Grand Jury had no authority to make them, and exceeded their authority therein; and because the Grand Jury, if competent to make those presentments, had not complied—and the presentments were not founded on a compliance—with the requirements of the statute in that behalf. To sustain an application for a writ of *certiorari* to remove presentments, on the ground that they are illegal, the illegality must appear on the face of the presentments: the Court will not go behind them. The conditional order was granted on the application of David

If "the year of the King's reign, and the chapter and section of the Act of Parliament under which" a "presentment," for the levying of any public money, "is authorised to be made and stated," is not inserted on the face of the presentment, the omission is an illegality apparent on the face of the presentment; and warrants the granting, on that ground, of a writ of *certiorari*.

When the interests of a large portion of the public are concerned, the Court will sometimes grant a writ of *certiorari*, although the application for it has not been made until after the lapse of a period greater than would debar an individual from obtaining the writ to redress his own private injury.

A Grand Jury has not jurisdiction to make, on a county *at large*, re-presentments for arrears of county cess; nor to re-present arrears to be levied *by instalments*.

The Grand Jury of the county of Mayo re-presented arrears of county cess to be levied off the county *at large*, *by twenty instalments*.—*Held*, that there appeared on the face of the re-presentments an absolute want of jurisdiction such as warranted the Court in granting a writ of *certiorari* to remove them for the purpose of their being quashed.

The circumstance that some part of the moneys so re-presented had been in fact levied before the making of an application for a writ of *certiorari*, was held not to be a bar to the granting of the writ, and the quashing of the re-presentments.

A presentment, purporting to be for the costs incurred by the solicitor of a Grand Jury in relation to a Bill which was passing through Parliament at the time when the presentment was made, shows on its face an illegality which warrants the Court in granting, on that ground, a writ of *certiorari*.

*Semble*—That re-presentments can be now made by a Grand Jury only under the 19 & 20 Vic., c. 63, s. 6.

Rutledge, Esq., a cess-payer of the barony of Clanmorris, in the county of Mayo. The material facts stated in his affidavit were the following:—In the year 1855 the Grand Jury of the county of Mayo applied to Parliament for a *public* Act to authorise re-presentments for, and the collection of, arrears of cess alleged to be due by certain baronies of the county; but for which arrears there could not be found in the office of the Secretary to the Grand Jury, or elsewhere, any list showing how they had been made up, nor any affidavit verifying them. The application of the Grand Jury was rejected on the ground that the application should have been for a *private* Act. It was stated that the arrears had been caused by the impoverished state of the country, consequent on the famine; and by the insolvency or death of some of the cess-collectors, and of their sureties, some of whom had absconded.

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In the year 1861, Neal Davis, Esq., solicitor to the Grand Jury, was entrusted with the carriage of a *private* Bill to enable the Grand Jury to make, on seven baronies of the county of Mayo, re-presentments for alleged arrears of county cess. That Bill, having passed its second reading, was abandoned, in pursuance of a resolution passed by the Grand Jury at the Spring Assizes 1861. On that occasion the Grand Jury, without having any list of the arrears of the county cess, or any affidavit to verify it, as required by the 6 & 7 W. 4, c. 116, made the presentments complained of. They were made without previous application at Special Sessions, and without notice to the cess-payers, who were taken by surprise, and had no opportunity of traversing them at that Assizes. Mr. Rutledge further stated that he was not, until some time after the Assizes had terminated, aware of the passing of those presentments, and that he had not attended at the Assizes, because he was sure that the Bill—which had at that time passed its second reading—would not be abandoned by the Grand Jury; and excused his delay in applying for the writ of *certiorari*, on the ground of a rumour, which he had heard, that the presentments might be traversed at the then ensuing Summer Assizes. Recent advice of Counsel, that there would be great difficulty in doing so, had caused him to apply for the writ of *certiorari*.

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The first presentment was couched in the following terms:—

"County of Mayo,  
 to wit."

"Pursuant to 6 & 7 *W.* 4, c. 116,  
 sec. —."

"By the Grand Jury, at Spring Assizes 1861, assembled:—We  
 "present that the sum of £500 be raised off the county at large,  
 "and paid to our treasurer, and by him to Neal Davis, Esq.,  
 "Grand Jury solicitor, to meet the expenses of the Bill, *now*  
 "before Parliament, in relation to the arrears of county cess.

"£500.

"R. L. Blosse, Foreman."

The second presentment—for printing and advertisements in  
 relation to the Bill—need not be set out, as the objections to it  
 were, during the argument, abandoned.

Third:—

"County of Mayo,  
 to wit."

"Pursuant to 7 *W.* 4, *cap.* 2,  
 sec. 15."

"By the Grand Jury, at Spring Assizes 1861, assembled:—We  
 "re-present that the sum of £5936. 7s. 3d., be raised off the county  
 "at large, and paid to our treasurer, being so much county  
 "cess unpaid and in arrear: out of said county at large to be levied  
 "by twenty instalments.

"First instalment £296. 16s. 4d.

"£296. 16s. 4d.

"R. L. Blosse, Foreman."

Fourth:—

"County of Mayo,  
 to wit."

"7 *W.* 4, *sec.* 2, *cap.* 15.  
 Pursuant to 6 & 7 *W.* 4, c. 116, s. —"

"By the Grand Jury, at Spring Assizes 1861, assembled:—We  
 "re-present that the sum of £2521. 17s. 0½d., be raised off the  
 barony of Kilmain, and paid to our treasurer, being so much  
 county cess unpaid or in arrear: out of said barony to be levied  
 by twenty instalments.

"First instalment £126. 1s. 10½d.

"£126. 1s. 10½d.

"R. L. Blosse, Foreman."

Fifth:—

"County of Mayo,  
 to wit."

"7 *W.* 4, *cap.* 2, *sec.* 15.  
 Pursuant to 6 & 7 *W.* 4, c. 116, s. —"

"By, &c.:—We re-present that the sum of £879. 12s. 9d., be

"raised *off the barony of Erris*, and paid to our treasurer, being  
 "so much county cess unpaid or in arrear : out of said barony to be  
 "levied by twenty instalments.

"First instalment £43. 19s. 7d.

"£43. 19s. 7d.

"R. L. BLOSSE, Foreman."

The remaining five re-presentments were the same as the fifth, save that the sums to be levied, and the names of the baronies, differed in each.

The treasurer of the Grand Jury filed as cause an affidavit, the material statements in which were:—That the arrears re-presented for had accumulated during the years of distress, when it was impossible to levy the cess; but that the Grand Jury considered that they could not, in justice to the persons to whom the arrears were due, and who had made repeated applications for payment, permit these arrears to remain longer outstanding; and that they made the presentments accordingly, in the belief that they had legal power to do so, and having observed every preliminary which they were advised was necessary and proper to ground a valid presentment; that the deponent never heard any report that it would be possible to traverse these presentments at the then next Assizes, but believed that, from his official position, he would have heard any such report if it existed; that great satisfaction was expressed at the Assizes, at the arrangement of a matter which had been so long pending; that, the presentments having been filed, he had issued warrants under which *the first instalment had been levied*, and lodged in the Bank of Ireland; that the cess-payers had the fullest notice of the intention of the Grand Jury to pass, and of their passing, the presentments; that the private Bill was not proceeded with, on account of a petition against it from some cess-payers, and because such an Act was really unnecessary, as it was considered that the Grand Jury had power to make the presentments; and that the Bill was abandoned with the full consent of the cess-payers, and under an arrangement with them, that the presentments should be passed. The deponent further submitted that the presentments were perfectly legal, and that the conditional order ought

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to be discharged, not only on that ground ; but also because of the great delay and *laches* on the part of the applicants.

A joint affidavit, in reply, was filed by David Rutledge, Esq., and Geoffrey Martin, Esq., in which it was stated (amongst other things) that the Grand Jury, in making the re-presentments, were conscious that they were acting *illegally* ; as they had been previously supplied with the opinion of eminent Counsel, to the effect that it would be *illegal* to make such re-presentments, without the verifying affidavit being before them. The affidavit also contradicted the statement that the bill was abandoned with the consent of the cess-payers ; and denied that any arrangement, as to the re-presenting of the arrears, had been entered into by them. The affidavit also denied that the re-presentments gave great satisfaction ; and, in support of such denial, referred to written protests and objections against these re-presentments, signed by upwards of 1800 landholders and cess-payers of the county Mayo. The affidavit further stated that, in 1860, the Grand Jury had appointed a committee to draw up a report, showing how the arrears, when collected, ought to be applied ; which report was printed, and in which it appears that the great bulk of the said presentments were made in the years 1859 and 1860, when no arrears at all accrued, and when the county cess was paid to the farthing ; and that it contains several presentments to the Under-Sheriff, in 1853 and 1855, which were declared illegal at the time by the then going Judge of Assize.

Serjeant *Armstrong* (with him *P. J. Blake*) now moved to make absolute the conditional order.

The 6 & 7 *W. 4*, c. 116, s. 127, enacts "that, on the face of "every presentment for the levying of any public money whatsoever, the year of the King's reign, and the chapter and section of "the Act of Parliament . . . . under which such presentment "is authorised to be made and flated, shall be inserted, . . . . "and all presentments not made according to the directions foregoing shall be *null and void*." In the first presentment here, no section at all is mentioned in the heading ; while, in the second, reference is made to a statute (7 *W. 4*, c. 15, s. 2) which has nothing

to do with the subject, for it is intituled "An Act to discharge his Majesty's manor and demesne lands at Newark" from certain costs. The remaining re-presentments refer to the 7 W. 4, c. 2, s. 15. That section does not authorise these re-presentments. The only new power thereby given to the Grand Jury is to raise arrears of cess, re-presented for off "any part or portion" of the lands on which it was originally imposed. With the addition of the words "any part or portion," it is a transcript of the first part of the 6 & 7 W. 4, c. 116, s. 145, to amend and extend which it was passed. That section is not repealed, either expressly or by implication; and must therefore be complied with still. Its concluding proviso is—"That before it shall be lawful for any Grand Jury to re-present any sum of money as unpaid or in arrear, out of any county, or barony, or denomination, to be raised and levied on such county, &c., it shall be made appear, *by affidavit of the collector, to such Grand Jury, that such sum is actually in arrear and unpaid by such county, &c., respectively, and that it could not have been levied from the persons, or out of the lands charged with or liable to pay the same.*" Now, it has been sworn by the applicant that no such affidavits are in existence; so that the Grand Jury had no jurisdiction whatever to make these re-presentments. That allegation has not been contradicted, or even alluded to in the answering affidavit. This objection is common to all the re-presentments; and the provision was enacted to prevent defaulting collectors from being sheltered, and to protect the county from paying cess over and over again for the same purposes. All doubt is removed by the 7 W. 4, c. 2, s. 18, which enacted that the 6 & 7 W. 4, c. 116, "shall remain in full force, except where expressly repealed or altered by this Act;" and that both Acts shall be construed as one. Therefore the re-presentments are null and void, as the commands of the 6 & 7 W. 4, c. 116, s. 145, have not been obeyed; though compliance with them was essential, to found the jurisdiction of the Grand Jury. It is very questionable whether even a reference to that Act would have been sufficient, and whether the title should not have been 19 & 20 Vic., c. 63, s. 5; for Sergeant Howley, the going Judge of Assize, decided at Leitrim, vol. 14.

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in the year 1860, that *all* re-presentments are now regulated by the 19 & 20 *Vic.*, c. 63, s. 6: *Keane, app., Lawder, resp.* (a) Two cases have decided that the words in the 6 & 7 *W.* 4, c. 116, s. 127, are mandatory: *In re Forth* (b) and *In re Newton* (c). Furthermore, the re-presentments direct that the money re-presented for shall be raised by instalments. The Grand Jury have not any power to direct that money, re-presented for arrears of cess, shall be raised in that way. *In re Quinn* (d) and *Ex parte Henn* (e) decided that, on a motion for a writ of *certiorari*, the Court will not go behind the presentments, in order to ascertain whether they have been properly obtained. Those cases are not decisions against this application; because in both of them the jurisdiction of the Grand Jury existed. *In re Quinn* was decided on the ground that the words of the Act there in question were only directory; and in *Ex parte Henn* the Court held that the applicant was not entitled to be served with the notice, the non-service of which was his objection. But, in the present case, the objections are founded on the non-performance of certain acts, the performance of which was necessary, as a condition precedent, to found the jurisdiction of the Grand Jury. Counsel then cited the *County Down Presentment case* (f), to show that the applicants could not have traversed the presentments or re-presentments at the ensuing Assizes; and further contended that the applicants, in their affidavits, had sufficiently accounted for the delay which had taken place in making this application.

Serjeant *Sullivan, Brewster, Buchanan*, and *M. Morris*, contra.

Under the 16 & 17 *Vic.*, c. 136, s. 6, the Grand Jury have power to present for their solicitor's costs, incurred on behalf of the county. Therefore the error in the first presentment is merely technical, and not a ground for granting a writ of *certiorari*. It has been contended that the re-presentments should have been

(a) Foot's Grand Jury Laws of Ireland, 395.

(b) 2 Cr. & Dix, 469.

(c) Ir. Circuit Rep. 554.

(d) 9 Ir. Law Rep. 160.

(e) 6 Ir. Com. Law. Rep. 239.

(f) Jebb's Reserved Cases, 20.

headed 19 & 20 *Vic.*, c. 63, s. 6. But that Act does not apply to re-presentments for arrears. Another objection to the first re-presentment is, that the "7 *W.* 4, c. 2, s. 15," is the heading; whereas the reference ought to be to the "7 *W.* 4, c. 15, s. 2." No doubt, the reference is wrong; but no one could have been misled by it, and it is only a technical error of the most trivial character.

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Again, the want of the verifying affidavit furnishes no ground for granting a writ of *certiorari*, which can only issue on account of *error apparent on the face* of the re-presentments. But the absence from the re-presentments of an averment that such an affidavit was laid before the Grand Jury is not an error *apparent on their face*. No such averment is necessary, nor is it ever inserted. The want of the affidavit must be objected to by a traverse, on the ground of illegality; and the objection cannot be allowed after the Judge has fiatd the re-presentments, unless the Court departs from the principle "*post judicium omnia præsumentur rite fuisse acta*." These considerations were confided by Parliament to a particular tribunal, which has given its judgment upon them, and that judgment cannot now be reviewed. Brady, C. B., no doubt, refused to fiat the presentment in the case of *In re Newton*, on the ground that the section was not stated; but that was at the Assizes, and that case is no authority for the issuing of a writ of *certiorari* to remove re-presentments which have been fiatd without objection. In *Rex v. The Inhabitants of Pennegoes* (a), the Court refused to grant, after judgment, a writ of *certiorari* to remove an indictment from the Quarter Sessions; saying that the parties "can now avail themselves of objections to the indictment by writ of error *only*." The same principle, that the Court will not inquire into anything antecedent, so long as no error is apparent on the face of the document, is established in *The Queen v. Whiston* (b) and *The Queen v. M'Kay* (c). Also the Court refused to go behind the presentments in the cases cited for the applicant here, *In re Quinn* and *In re Henn*. As to the mode of raising these arrears

(a) 1 B. & Cr. 142.

(b) 2 Dowl. Pr. Cas., N. S., 408.

(c) 2 Ir. Law Rep. 16.

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by instalments, there is not any section which forbids the Grand Jury to direct the time and mode of levying the money. This method was adopted for the ease of the cess-payers. Many of them would have been pauperised if the whole of the arrears were levied within one year. It is not denied that the debts are justly due; and it was essential to the preservation of the public faith that the debts should be paid at *some* time, and to the safety of the county that the payments should be spread over a number of years.

*P. J. Blake*, in reply.

The presentment for the costs of the Grand Jury's solicitor cannot be supported under the 16 & 17 *Vic.*, c. 136, s. 6; for that section contains a proviso "that no such presentment shall be made "unless there shall have been laid before such Grand Jury *a bill, duly taxed and certified by the proper Taxing Officer, of the costs incurred for any of the purposes aforesaid, for which such presentment shall be required.*" Now, the presentment for the solicitor's costs is "to meet the expenses of the Bill *now* before Parliament;" so that there is manifest error on the face of it: for the costs could not have been taxed while the bill was still before Parliament. The presentment is for expenditure *anticipated* only; whereas the Act requires that it shall *have been* actually incurred. That presentment, at all events, must therefore be brought up to be quashed. The re-presentments also clearly show error on the face of them; for the direction is to levy the money by instalments. No doubt, as has been argued, the statute does not, in terms, forbid the Grand Jury to raise money in that way; but the power of the Grand Jury is wholly the creature of statutes. They have therefore no jurisdiction except what is derived from those statutes; and yet the argument urged for the applicant is, that the Grand Jury have the jurisdiction, unless the statute says that they shall not have it. Inherent jurisdiction cannot be presumed. Besides, wherever Parliament intended that the Grand Jury should have power to raise money by instalments, that power is given in express terms; as in section 69. Now, if the Grand Jury already possessed the inherent general jurisdiction claimed for them in this respect, it would have

been idle to insert a section for the sole purpose of giving them that very jurisdiction in a particular instance. A like argument may be drawn from the 16 & 17 Vic., c. 136, s. 1, which enabled Grand Juries, in order to obtain loans of money, to order that they should be repaid by instalments. It is therefore quite plain that the Grand Jury have no power to raise money by instalments, except where that power is expressly given to them by statute. Therefore these presentments and re-presentments are all bad on the face of them, and must be brought up and quashed.

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*Cur. ad. vult.*

LEFROY, C. J.

This case has come before the Court by way of an application for a writ of *certiorari* to bring into Court, for the purpose of having them quashed, certain presentments passed at the last Spring Assizes for the county of Mayo. Those presentments may be arranged under three heads. The first is a presentment for a sum of money to be paid to the solicitor of the Grand Jury of Mayo, to defray the expenses of certain bills promoted in Parliament by the Grand Jury; and the other two heads include certain re-presentments on the county *at large* for one-half of certain arrears due by *particular* baronies; and also re-presentments for the remaining moiety on those *particular* baronies themselves. In each of these re-presentments it is directed that the money shall be raised by twenty half-yearly instalments. But, before I enter into the consideration of these particular presentments, two great preliminary questions, standing prominently in view, must be considered. One of these is with respect to the principle on which the Court in general grants writs of *certiorari*; and the second relates to the principle upon which the Court acts or refuses to act upon these writs. We are all agreed that these writs are not granted *ex debito justitiæ*; but must be granted at the discretion of the Court—that is a judicial discretion. Another general principle is that, in granting the writ in cases of this sort, we cannot go behind the presentments. Now the action of the Court is ascertained by the cases, founded upon the authorities in England, which have been referred

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to; and in fact we have only to apply in the present instance to this species of cases, that great principle of the Common Law—  
*"post judicium omnia præsumentur rite fuisse acta."* When a Court of Record gives a judgment, it is presumed that every preliminary act, which is necessary and essential to found that judgment, has been done; and accordingly that principle is applied here to the Judge's *fiat*. It is a perfect act of a Court of Record having jurisdiction over the particular subject. With these preliminary observations, I will proceed to dispose of the several presentments; and, taking them in the order to which I have adverted, I think that I shall be able to show that, though in this instance we grant the writ of *certiorari*, we do so consistently with the rules which I have adverted to as being the guides of the Court: and that, upon a careful consideration of the facts relevant to the several subject-matters of this application, it will appear that we do not at all infringe upon those rules.

It is true that a Court, in the exercise of its judicial discretion, occasionally has its attention directed to many circumstances, such as the conduct of the applicants, as furnishing grounds for withholding its action; and I must confess that, upon that ground, I did hesitate for some time with respect to the delay which took place from the time when these presentments were made, to the date of the application to the Court for a writ of *certiorari*. On further consideration however, and on looking more carefully into the cases in which the Court has been induced by circumstances to withhold its action, there appears to me to be a solid distinction between this case and those others. Here we have a great public question, affecting the rights of a large body of persons; whereas the others were cases wherein a private individual came to the Court only to assert and vindicate his own private right. It was the over-readiness to grant this writ, in cases of that description, which induced Lord Mansfield to say, that the frequency of such applications to the Court had become such a nuisance, and was made a subject of so much oppression and litigation, that he thought it right to make a rule that the parties applying should give security for the costs in case of failure. But the case is very different in

respect to the subject-matter of the present application, which involves a question seriously affecting the rights of a large body of persons. A question of great public importance is involved; and, with respect to the delay which has taken place, the expression "what is everybody's business, is nobody's business," may in some measure at least do away with the effect of the *laches* which has occurred in coming to the Court. The applicants here come to redress what would be, not only a great inconvenience, but a great injustice to a large body of persons, if we suffered these presentments to stand. When I come to examine the great body of them, we shall find that a great practical injustice would be the result of allowing these presentments to stand; and therefore, with respect to the rules by which the Court is guided in private cases, it appears to me that this case does not come within the principle upon which the Court sometimes acts in refusing the relief which is sought.

Now the grounds upon which, at least, a majority of the Court think it right to grant the writ of *certiorari* in the present instance are these:—the first is that to which I have already adverted, namely, the public importance of the question involved, and the extent to which the rights of a large number of persons are affected. But, secondly, the manifest injustice which must ensue if we suffer these three classes of presentments to stand, whether in respect to the county at large, or in respect to the individual baronies, as to the presentments for baronial purposes. Now, in respect to the re-presentments upon the county at large, for county charges, I find, upon looking carefully into the case, that really there is no jurisdiction, but rather an absolute want of legislative jurisdiction, to re-present assessments. I shall give a summary of the statutes upon the subject, rather than go through their provisions in every particular instance in which they are applicable.

Four statutes are involved in the consideration of the grounds upon which my judgment is formed:—the first is the 6 & 7 *W.* 4, c. 116; the second is the 7 *W.* 4, c. 2; the third is the 16 & 17 *Vic.*, c. 136; and the fourth is the 19 & 20 *Vic.*, c. 63. The sections relating to the questions which arise in this case will be found in one or other of those statutes. Then (to come back to the pre-

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sentments for the county charges), the statute which gives authority to re-present does not embrace the re-presenting of assessments upon the county *at large*. And, a consideration of the parties on whom the original presentment was made, will show the gross injustice that would be worked by suffering a re-presentment of the county assessments, made for county purposes. Those presentments are carried out by apportioning amongst the baronies their several quotas to the presentments on the county *at large*; which quotas are raised along with the baronial assessments, made for the purposes of the individual baronies. Therefore if there be a default,—which of course is implied by the fact of a re-presentment being made, and the re-presentments now before us are of necessity made in consequence of defaults in the levy of the original presentments,—the baronies that have actually paid their quotas under the original presentments will nevertheless be subject to these re-presentments, and will have to pay their quotas a second time, in order to defray the debts of the defaulting baronies. In this there is a manifest injustice, which affects a large class of persons. There is too a great inconvenience, as well as a great injustice; and upon that ground it seems that there is sufficient reason for the interference of the Court in this particular instance, notwithstanding the *laches* exhibited by the applicants in coming to the Court.

But there is another objection to these re-presentments:—they are directed to be levied by instalments. Now, there is no express legislative authority for that direction. When we look to the origin of this right of presenting money for public purposes, especially for the construction and repairing of roads, it is very remarkable the difference which exists between the law in England and that in Ireland upon this subject. In England, the road is kept in order by the parish, and an indictment lies against the parish if it neglects to keep the road in proper repair. In Ireland, the same object is effected by a legislative authority to raise money off the barony. This, being a mere statutable power, can be exercised only so far as the Legislature has given it. Now, the circumstance that the Legislature has allowed money to be raised by instalments only in particular instances, is a strong proof that it cannot be raised in that

manner by force of the general law. Where this special power is given, it is only in the way of permission, not a restriction of a general right; which shows that there exists here no original right to levy money in this way, and that the gift of a power to levy money did not carry with it, *per se*, the power of levying money by instalments. Upon that ground, it appears to me quite plain that this presentment to levy money by instalments is illegal, and that there is an absolute want of jurisdiction to do it. We therefore think that, both with respect to the other ground and to this, we do not contravene the rule which forbids us to go behind the presentments in order to invalidate them; because the absolute want of jurisdiction appears on the face of these presentments. There is no statutable power given to re-present county assessments, and there is no authority to levy by instalments. Here however there is a direction to levy the money by instalments; and therefore we have, on the face of the presentments, that which invalidates them; and we are not going behind them to search out a ground for setting them aside.

There is a further objection, on the ground of inconvenience—namely, that it would be doing, by a re-presentment, that which could not be done by an original presentment. These are the observations which it occurs to me to make; and which, in my judgment, are a foundation which justifies us in granting the writ of *certiorari* in the present case.

As to the money presentments, the words of the statute are so express,—the power being given only to present for a taxed bill of costs where the work has been done, and the public has actually had the benefit of it,—that I ask, how is it possible, under an authority of that sort, to justify an advance, upon trust that the work may be done at some future time, though it is also possible that the work may never be done? Yet that is what has been done here; and the thing for which the presentment was made does not exist. The ratepayers ought to have some value for the money which they give; and should not be liable to be called upon for an advance of money beforehand, as was done here.

There is also a presentment for printing; but, as to that par-

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I am also of opinion that the conditional order for a *certiorari* should be made absolute as to *nine* of the presentments in question, namely, those for Mr. Davis's costs, and for the re-presentments of arrears; but not as to the *tenth* presentment, which was for Mr. Bole's printing bill. The facts of this case are very peculiar, and it is not likely that a similar one will occur; but the questions which have been raised involve so many principles affecting the administration of the Grand Jury system, that I think it advisable to refer in detail to the several grounds of objection which have been taken to those presentments.

It appears, by the affidavits, that during the year 1849 and the subsequent years, when great distress prevailed in the county Mayo, considerable arrears of county cess had accrued due *in several*, but not in *all*, of the baronies of that county; that accordingly large sums were due by the county, as well to the Government for advances, as also to contractors and others for works, &c.; that, in 1856, a Bill was brought into Parliament by Government, to recover payment of their advances, by enabling the Grand Jury to raise, by re-presentment, so much of the arrears of county cess as should be requisite for the purpose; that an effort was made to introduce into the Bill a provision, enabling the Grand Jury to re-present the entire of said arrears; but it having been ascertained that such a provision should not be introduced into a public Act, but was more properly matter for a private Bill, the then proposed Bill was accordingly abandoned; and, in the next year (1857), a public Act was passed, confined to the repayment of Government advances. It also appears that, at the Summer Assizes of 1859, the Grand Jury passed a resolution, appointing a committee to take the necessary steps for obtaining a private Act of Parliament, to enable the Grand Jury to collect, by re-presentment, the arrears of cess which were then irrecoverable, with power to borrow money, &c.; and

\* By permission of LEFFROY, C. J., this judgment has been published *ex relatione*.

that subsequently application was made to Parliament, by some of the Grand Jury, for a private Bill, to enable the Grand Jury to re-present said arrears (amounting then, as stated, to over £11,600) upon seven baronies of said county. Some of the cess-payers petitioned Parliament against said Bill; and, at the Spring Assizes of this year, a resolution was passed by the Grand Jury that said Bill should be abandoned (which was accordingly done); and, at the same Assizes, the several presentments now complained of were passed.

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The *nine* presentments, as to which I think the *certiorari* should be granted, are as follows, viz.:—*one* for £500, to be levied off the county at large, and “*paid to Mr. Davis, Grand Jury solicitor, to meet the expenses of the Bill then before Parliament, in relation to the arrears of county cess.*” That was the Bill which was abandoned by the Grand Jury, as above-mentioned. Another presentment, for £5936. 7s. 3d., “to be raised *off the county at large*, “and paid to the treasurer; being so much county cess unpaid and “in arrear out of said county at large; and to be levied in twenty “instalments.” And *seven* other presentments, for the several sums therein mentioned (amounting together to a *like sum of* £5936. 7s. 3d.), to be levied off the seven baronies therein respectively named, “*being so much cess unpaid or in arrear*” out of said several baronies respectively; and also “to be levied by twenty instalments.”

With respect to these several presentments, it will be necessary to consider two different questions:—First, whether they are respectively illegal, upon grounds that would warrant the issuing of a *certiorari*, for the purpose of their being quashed; and, secondly, whether, in the exercise of that discretion which this Court unquestionably has, and frequently exercises, of refusing a *certiorari*, even though the illegality of the proceedings complained of would warrant our issuing it, we should now grant or refuse such writ, in respect of these several presentments.

As regards the first question, I concur in the principle laid down and acted on in the cases of *In re Henn (a)* and *In re Quinn (b)*—

(a) 6 Ir. Com. Law Rep. 244.

(b) 9 Ir. Law Rep. 160.

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namely, that, in order to sustain an application for a *certiorari* in respect of a presentment, on the ground of its being illegal, the illegality should be apparent on the face of the presentment itself; and that this Court should not go behind the presentment to see whether it had been properly obtained, or whether certain preliminary proceedings, directed by the statute, had been taken. We should therefore, in deciding upon the legality of the presentments now before us, put out of consideration the statement that the collectors had not made the affidavit which the 145th section of the Grand Jury Act of 1836 (6 & 7 W. 4, c. 116) requires to be made, as a condition precedent to the re-presentment of arrears, and we should consider only how far there is illegality or error on the face of the presentments themselves.

There is one objection, on the ground of illegality, which is relied on as against *all* these nine presentments—namely, that none of them sets out correctly the particular statute or section under which they were authorised, as is expressly required by the 127th section of the Grand Jury Act of 1836, whereby it is enacted “that on the face of every presentment, for the levying of any public money whatsoever, the year of the King’s reign, and the *chapter* and *section* of the Act of Parliament under which such presentment is authorised to be made and flated, shall be inserted;” and, further, “that all presentments, not made according to the directions foregoing, shall be null and void.” It is clear, from the language of this section, that the omission to comply with this direction renders a presentment illegal; and that such omission, being apparent on the face of the presentment, would warrant the Court in granting a *certiorari* on that ground.

I shall first refer to the presentment of £500 to Mr. Davis for costs, which it is alleged was authorised by, and made in pursuance of, the 6th section of the Grand Jury Act of 1853 (16 & 17 Vic., c. 136); but the presentment itself contains no reference whatever to that statute: it purports, on the face of it, to be made in pursuance of the Grand Jury Act of 1836 (without stating any particular section); but there is no section of that Act which, in any manner, authorises the making of such a presentment. The

presentment therefore is clearly illegal on this ground. This objection has been designated as a "*technical one*;" but there is another objection which cannot be so described, and which is also apparent on the presentment itself, namely, that it was made contrary to the express provisions of said 6th section of the Grand Jury Act of 1853, under which alone any such presentment could have been made. That section authorises the Grand Jury (amongst other things) to present "such sums as may be necessary for any costs incurred in the conduct and management of any matter of business which the Grand Jury may consider right and proper, for the interests or benefit of the county, should be confided to, or conducted by, any Counsel, solicitor or agent;" but it also expressly provides "that no such presentment shall be made, unless there shall have been laid before the Grand Jury a bill, duly taxed and certified by the proper Taxing Officer, of the costs incurred for any of the purposes for which such presentment shall be required." Now, the presentment in question appears on the face of it to have been made, not for the payment "of any taxed bill of costs," but "to meet the expenses of the Bill before Parliament;" showing clearly that it was a payment *on account* for costs thereafter to be taxed and ascertained; and some of which might not have been even incurred at the time of the presentment. By requiring the costs to be taxed before being presented for, the Legislature imposed a salutary check upon improvident and irregular payments by the Grand Jury to their solicitor; and it would be contrary both to the express words and to the policy of the statute, to sanction a presentment so decidedly at variance with its provisions.

With respect to the legality of the eight other presentments, for sums to be raised off the county at large, and said seven baronies respectively, for arrears of county cess, two grounds of objection (to which I shall presently refer) were relied on by Mr. Rutledge's Counsel, as applicable to all such presentments; but at the close of the argument, another objection, applicable especially to the presentment for £5936. 7s. 3d., to be raised *off the county at large* for arrears of cess, was suggested by the Court; namely, that a re-

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presentment off the county at large, for arrears of county cess, was not, under any circumstances, authorised by statute. The Counsel on both sides declined any further argument as to this objection; and it is in my opinion decisive as to the illegality of that particular presentment. The provision authorising re-presentments for arrears of cess are contained in the Grand Jury Acts of 1836, 1837 and 1856 (*viz.*, 6 & 7 *W.* 4, c. 116, s. 145; 7 *W.* 4, c. 2, s. 15, and 19 & 20 *Vic.*, c. 63, s. 6). It will be necessary (with respect to other questions in this case) to consider under which of those statutes any re-presentments for raising arrears of cess, out of particular baronies, should now be made; but it is clear that a presentment for raising arrears of cess off the county at large is not authorised by any of those statutes. The 145th section of the Act of 1836, and the 15th section of that of 1837, which authorise a Grand Jury to re-present such sums of money as should be "unpaid or in arrear out of any denomination, barony, or county of a city or town," also provide that such sums of money shall be re-presented "to be raised and levied on such denomination, barony, county of a city or town, upon which the same was originally required by the treasurer's warrant to be levied." And the 6th section of the Act of 1856 provides that the sums of money, to be re-presented for arrears of cess as therein mentioned, shall be re-presented, "to be paid by the several and respective townlands, baronies, or half-baronies, *within which the houses, tenements or hereditaments* (on which, or in respect whereof, the sums remaining unpaid should have been apportioned) *shall be situate.*" But no provision is to be found in any of said statutes for re-presenting off a county at large any arrears of county cess, although there is a provision in said 145th section of the Act of 1836, enabling the Grand Jury to re-present, either upon the county at large or the barony, as they should think fit, any sums of money remaining unpaid by reason of the absconding or insolvency of any county treasurer or collector. It is also clear that any re-presentment off the county at large, for arrears of cess, would be inconsistent with the principles and rules according to which the amount to be raised for county cess is ascertained and

apportioned. The entire amount to be raised off each barony, for any Assizes, is ascertained by calculating the sum that would be sufficient to pay the amount of presentments passed at that Assizes for such barony; and also to pay the proportion which that barony should contribute (ratably with other baronies) to make up the amount of presentments passed for the county at large. It is true that a portion of the sum to be raised off each barony, by the levy of the cess, is applicable to the payment of its proportion of the presentments for the county at large; and that (in case of arrears of cess in any barony), a portion of those arrears would be applicable for the same purpose: but such portion of the arrears may in fact be regarded as a debt due by that barony to the county at large, for the payment of which (as well as of the other portion applicable to baronial presentments) that barony alone should be properly liable. The effect of re-presenting, upon the county at large, any portion of the arrears of cess due by particular baronies, would in fact be, that portions of the arrears due by each of those baronies would be levied out of *all* the other baronies in the county: a result altogether at variance with the policy and provisions of the Grand Jury Acts, which manifestly contemplate that each barony should bear the burden of its own arrears, instead of any portion thereof being re-presented on other baronies.

In the case now before us, it appears that the arrears due by seven baronies of the county amounted to £11,872. 14s. 6d (the arrears due by some being greater in proportion than those due by others); and that the remaining baronies of the county were not in arrear at all; and yet, by the presentment in question, half of that sum was, by some unexplained and apparently arbitrary calculation, thrown upon the county at large; whereby, not only those remaining baronies (which were in no default) would be compelled to contribute towards the deficiencies of the others, but even, as between these seven defaulting baronies themselves, the amount of their several contributions would not be in proportion to that of their respective arrears. I am therefore of opinion that, independently of any other objection, this particular presentment is upon the face of it clearly illegal, on the ground that a re-present-

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ment off a county at large, for arrears of cess, is not authorised by any of the Grand Jury Acts.

We have next to consider the two grounds of objection taken to the legality of the *seven* presentments for raising arrears of cess out of the seven defaulting baronies respectively; and which objections are apparent on the presentments themselves, and are also applicable to the presentment off the county at large; namely, first, that none of them set out correctly the statute, or section of the statute, under which alone they were authorised to be made; and, secondly, that they were made payable by instalments, and that such mode of levy is not warranted as to such presentments.

With respect to the first of these objections, I have already referred to the provisions of the Grand Jury Act of 1836, requiring that, in every presentment, the statute and section of the statute under which it is authorised shall be inserted. The statute of the 7 *W.* 4, c. 2, s. 15, is inserted in the presentment on the county at large, as that under which it is authorised; and that same statute and section, and also the 6 & 7 *W.* 4, c. 116 (without mentioning the section), are referred to in the seven baronial presentments as the statutes under which they are respectively authorised. It is however contended by Mr. Rutledge's Counsel (and I think rightly), that the subsequent Grand Jury Act of 1856 (19 & 20 *Vic.*, c. 63, s. 6), is the Act under which alone all re-presentments, made since it was passed, for arrears of cess, whether such arrears accrued previous or subsequent to said Act, are authorised. The 6th section of that Act provides—"That *where sums have been or shall hereafter be presented by any Grand Jury in Ireland, and applotted on any houses, tenements or hereditaments; and where, owing to the alteration of boundaries or other causes, it has been or may be found impossible to collect the sums applotted on any such houses, tenements or hereditaments respectively, or the occupiers thereof, it shall be lawful for the Grand Jury, without any previous application to Presentment Sessions, to re-present all such sums, &c., &c. . . . on the several townlands or baronies within which such houses, tenements or hereditaments shall be situate.*" The subsequent

part of that section requires that certain proceedings should be taken, preliminary to the making of every such re-presentment, which proceedings are essentially different from those required by the previous Act of 1836; and instead of "*the affidavit of the collector*" required by the 145th section of that previous Act, it provides "that no such re-presentment shall, in any case, be made "by the Grand Jury without *previous examination on oath* as to "the inability of the collector to levy same, *owing to the insolvency of the parties chargeable therewith, or to the difficulty of tracing out or identifying such houses, tenements or hereditaments, or other sufficient cause, notwithstanding all reasonable exertions,*" &c., &c. And it also provides that a list or schedule of such arrears, containing the other particulars therein mentioned, should be posted, at least ten days before the Assizes, at the usual place for posting notices for presentments within the barony; and that it shall be competent for any parties interested to object to the re-presentment of such sums; and that the Grand Jury should hear the objections of such parties. These provisions differ materially from those in the previous Act of 1836, and impose further checks upon the power of making re-presentments. It cannot be supposed that the Legislature intended that both sets of provisions should remain in force in respect of the same subject-matter, or that it should be in the discretion of the Grand Jury, in making re-presentments, to disregard the provisions of the Act of 1856, and adopt the more defective machinery of the previous Act. I am accordingly of opinion that the provisions in the subsequent Act of 1856, as to re-presentments, supersede, though they do not expressly repeal, the corresponding provisions in the previous Act of 1836; and that all re-presentments made since the passing of said subsequent Act for arrears of cess (whether they accrued before or after that Act was passed), should be made according to its provisions, and under its authority. It was indeed argued, by Counsel for the Grand Jury, that these provisions, as to re-presentments, in the last Act of 1856, applied only to those counties where the general valuation therein referred to had been completed (which did not appear by the affidavits to have taken place in the

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county Mayo); and further that, in any event, these provisions applied only to cases where the impossibility of collecting the arrears arose from "*the alterations of boundaries.*" A reference to the statute will however show that neither of these propositions can be maintained. With respect to the latter proposition, section 6 provides in its terms, for all cases of re-presentments where the impossibility of collecting the arrears arises "*from alteration of boundaries or other causes ;*" and the subsequent provision which I have already mentioned, for examination by the Grand Jury as to the inability of the collector to levy same "*owing to the insolvency of the parties chargeable therewith, or to the difficulty of tracing out or identifying such houses, &c., or other sufficient causes,*" &c., clearly show that the provisions for re-presentment, so general in their terms, were intended to apply to cases such as the present, as well as to those of alterations of boundaries. With respect to the other proposition, namely, that the 6th section applies only to those counties in which the general valuation had been completed,—it is true that the first five sections of the Act refer to such valuation, and to the applotments to be made thereunder, in counties where same should be completed : but the 6th section is general in its terms, not confining its provisions to such counties merely, but expressly providing for re-presentments in *all* cases where sums "*had been or should thereafter be re-presented by any Grand Jury in Ireland ;*" and there is nothing in the other parts of that section, or in the subsequent sections of the Act, which indicates any intention on the part of the Legislature to restrict those general words, or which shows that the completion of such valuation in a county was considered as requisite for carrying out therein those provisions as to re-presentments. It follows therefore that these eight re-presentments for arrears are erroneous on the face of them, as they do not state correctly the statute under which they were authorised.

The second, and more serious, objection to the legality of these eight re-presentments for arrears is, that they are made raisable "*in twenty instalments.*" The power of making presentments, in which the sums presented are directed to be raised by instalments,

is expressly given to Grand Juries by the 69th section of the Grand Jury Act of 1836, in cases of presentments made for the building, alteration, repairs, &c., of Court-houses or Sessions-houses, or for "*any other public works*;" and is not, in my opinion, vested in the Grand Jury, except in those cases where it is given them by statute. Considering the effect of such a mode of presentment, I think it advisable that the power of making it should not be extended beyond the clear provisions of the statute. It is given by the statute in cases where, from the nature of the expenditure, it is just and reasonable that the burden of it should be shared between the present and the future proprietors or occupiers of the land; but, except in such cases, it is right, as a general rule, and in accordance with the policy of the Grand Jury laws, that the burden of a presentment should be borne by the Grand Jurors who pass it, and by the other proprietors or occupiers for the time being. A salutary check is thus imposed upon improvident expenditure; which check would be of little avail if the Grand Jury were enabled to throw the far greater portion of the burden upon the future proprietors and occupiers, who, though they derive no benefit from the expenditure, would not have the power of questioning its propriety. It has been decided, *In re County Down*(a), that where a presentment has been passed and rated for a sum to be raised by instalments, a traverse would not lie to a presentment at a subsequent Assizes for one of those instalments.

It was urged for the Grand Jury, during the argument, that the provisions of the 145th section of the Act of 1836, and of the 15th section of that of 1837, which directed that the sums to be represented for arrears "shall be levied in the same manner, and "subject to the same rules, regulations, provisions and powers, as "any other moneys to be levied or presented by the Grand Jury," included the power of directing those sums to be levied by instalments. I am however of opinion (as contended for by Mr. Rutledge's Counsel) that, although those general words referred to the powers and proceedings of the treasurers and collectors for enforcing payment, and to the provisions for the application of the sums

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collected, they did not include the power of directing that the sums presented should be made payable by instalments. It is difficult to suppose that if the Legislature intended to give that power to the Grand Jury, in the case of such re-presentation for arrears, they would not have done so by express words, as had been done by the 69th section in respect of presentments for Court-houses, Sessions-houses, and other public works; and as was done by a subsequent section of the same Act (section 183) in respect of the sum of £8000 directed to be levied, by instalments, off the county of Tyrone. One consequence of the construction contended for by the Grand Jury would be, that although portions of the cess in arrear had been laid on to meet presentments, which could not have been originally made payable by instalments (as not being made for the purposes mentioned in the 69th section), yet that those presentments might afterwards, to a great extent, be virtually made raisable in that manner, by means of the re-presentments for such arrears being directed to be levied by instalments. In the case now before us, the objection to the legality of making those re-presentments payable by instalments does not rest merely on the construction of the Acts of 1836 and 1837; I have already stated that in my opinion the Act of 1856 (19 & 20 *Vic.*, c. 63) is the Act under which alone all re-presentments, made subsequent to that Act, for arrears of cess can be sustained; and that Act contains no provision whatever, either expressly or by reference, to the previous Acts of 1836 and 1837, which would authorise the Grand Jury to direct that re-presentments for arrears should be levied by instalments. I am accordingly of opinion that these eight re-presentments for arrears are also erroneous, on the ground of their being made payable by instalments.

The remaining question for our consideration is whether, although these nine presentments are, on the face of them, erroneous and illegal upon the several grounds I have mentioned, there are nevertheless circumstances in the case which should induce the Court, in the sound exercise of its discretion, to refuse the issuing of a *certiorari*, for the purpose of having those presentments quashed. The writ of *certiorari* is not merely a ministerial, but a judicial

writ; and the issuing of it for the purpose of quashing the proceedings of inferior tribunals, even where those proceedings are upon the face of them erroneous, is not a matter of right, but is to a certain extent discretionary with the Court. This principle was laid down by Lord Kenyon, in *The King v. Bass* (a); and has been recognised and acted on in *The King v. Denbighshire Justices* (b), and several other cases. But the discretion is one which should not be capriciously exercised; and in case of presentments so considerable in amount, and erroneous upon so many grounds, as those now before us, there should be very strong grounds to warrant our refusal of the writ. The circumstances upon which the Counsel for the Grand Jury rely for this purpose are, that the presentments were not objected to at the Assizes; that Mr. Rutledge's non-attendance there is no sufficient excuse for the objections not having been then taken; that there was further delay and *laches* on his part, in not applying to this Court for a *certiorari* until the last day of Trinity Term (nearly three months after the Assizes), during which period it is alleged that the treasurer's warrant was issued for the first instalments of all the arrears, and for the entire of Mr. Davis's presentment; and the amount thereof levied accordingly. Counsel further contend that great public inconvenience would result from now disturbing these presentments; that however irregular or erroneous they may be, they were substantially in accordance with the fair liabilities of the county; and were the only means of providing funds for payment of the large sums justly due to contractors and other parties.

Now, in considering how far we should be induced, in the exercise of our discretion, to refuse the writ of *certiorari*, by reason of the *laches* or conduct of the party applying for the writ, there is a material difference between cases where the party complains of proceedings which only affect himself individually, and cases in which (as in that now before us) the proceedings complained of affect the interests of a considerable body of the public.

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(a) 5 T. R. 251.

(b) 1 B. & Ad. 616.

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In the former class of cases (of which that of *In re Henn* (a) was one), the Court would properly have regard to the fact that the party who was alone injuriously affected by the presentment had omitted previous opportunities of objecting to it, or had (as in that case) apparently admitted its validity, by traversing for damages. But in the case now before us, not only all the present cess-payers of the county of Mayo, but the future cess-payers for ten years, are affected by the re-presentments for the arrears, which have the effect of throwing upon them a considerable burden that, under the Act of Parliament, should be borne exclusively by those who were cess-payers at the time of passing the re-presentments. It cannot be contended that the rights of such future cess-payers should be prejudiced by the objections not having been made at the Assizes; or by Mr. Rutledge's subsequent delay in applying for a *certiorari*. In fact, supposing the re-presentments legal in other respects, the present cess-payers, who alone could have objected at the Assizes, would be interested in having them passed in their present form, and made payable by instalments, as they would thereby throw upon others almost the entire of a charge which they would otherwise have borne themselves. It is also to be considered, with respect to the fact of these presentments not having been objected to at the Assizes, that, as they had not been laid before the Presentment Sessions, and as no notice was given of any intention to bring them forward at the Assizes, and to abandon the Bill then before Parliament, neither Mr. Rutledge nor the cess-payers in general had any reason to anticipate that such a course of proceeding would have been adopted, or that it would be requisite for them to attend the Assizes in order to oppose it.

It occurs to me further, that the principle of the decision in the case of the *County Down Presentments* (b), to which I have already referred, may be regarded as confined to those cases in which the Grand Jury were authorised by the Statute to make the presentments payable by instalments; but not as extended to cases where (as in that now before us) it appears upon the face of the presentment itself that they were not authorised to make it

(a) 6 Ir. Com. Law Rep. 239.

(b) Jebb's Res. Cas. 20.

payable in that manner; and that accordingly, though these presentments had originally passed without objection, the presentments for the subsequent instalments may be objected to at a future Assizes. If this be so, it would be a further reason for our granting the writ.

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With respect to the argument that, by quashing these presentments, the demands of contractors and others would be left unpaid, it appears to me that it will be in the power of a future Grand Jury, on proceedings being taken under the Grand Jury Act of 1856 (19 & 20 *Vic.*, c. 63, s. 6), to re-present such of the arrears as it should be found, upon the examination required by that section, could not otherwise be collected; and to re-present them upon the townlands, baronies, or half-baronies, in which the tenements originally liable to such arrears were situate. The previous publication of the lists and schedules required by that section will give notice to the cess-payers, and operate as a check upon any erroneous or improvident re-presentation.

As to Mr. Davis's presentment, I see no reason why any costs incurred by him, and for which the county is properly liable, under the terms of the 6th section of the Act of 1853, should not now be taxed. A future Grand Jury may present for the amount of such bill, and Mr. Davis would not be entitled to any greater sum.

With respect to the inconvenience of quashing presentments, the amount of which has been wholly or partially levied, it would be much less prejudicial than the consequences which would result from our holding that, however erroneous a presentment may be, the fact of its having been levied should be conclusive against its being quashed, and should prevent the interference of this Court.

It has been also urged, for the Grand Jury, that the objection, of these presentments not stating correctly the statutes under which they were made, is a technical one, which the Court, in the exercise of its discretion, should not consider a substantial ground for a *certiorari*, even though the 127th section of the Act of 1836 expressly enacts that every presentment, not made in accordance with this direction, "*shall be null and void.*" Now, supposing that a presentment was in fact authorised by the provisions of



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*some* statute, and was legal in all respects, except that it referred to a wrong statute as that under which it was made, or to no statute at all; and supposing also that the circumstances were such as that a Judge at the Assizes would, on the objection being then made, have directed the Grand Jury to rectify such error or omission, by adding to the presentment the title and section of the proper statute, I own I should not be disposed to grant a *certiorari* upon that ground alone; but, in the case before us, the circumstances are essentially different. The objection is one, not of form, but of substance; and is one which, if made at the Assizes, would probably have directed the attention of the Judge to the other illegalities in the presentments. A reference to the Grand Jury Act of 1858, section 6, in Mr. Davis's presentment, would have shown that the presentment was illegal, as his costs had not been taxed; and a reference to the Act of 1856, section 6, as that under which the re-presentments for the arrears were made, would have shown the Judge that, independent of the objection of their being made payable by instalments, the re-presentments on the county at large were not authorised by any statute whatever; and that the re-presentments on the baronies should not be stated, because the preliminary lists or schedules required by that section had not been published. It is true that, if the presentments were legal on the face of them, the non-publication of those lists or schedules would not be a ground for our issuing a *certiorari* (see the cases of *In re Hess* and *In re Quinn*, already referred to); but where the presentments are illegal on the face of them, by not referring to the statute under which they were authorised, and which required such publication as an essential condition to the validity of the presentments, then the fact of such non-publication is material for us to consider, in determining whether we should be warranted to exercise our discretion by refusing the writ, on the ground of the objection being merely technical.

For these several reasons, I am of opinion that the writ should be granted as to the nine presentments in question; there being substantial errors on the face of them, and there being no sufficient circumstances in the case to justify our refusal of the writ.

With respect to the *tenth* presentment, of £14. 0s. 6d. to Mr. Bole, for advertising, printing, &c., the objections to it have not been much pressed. It purports, on the face of it, to be made under the statute of 1836, section 47. It would perhaps more properly come under the 142nd section of that statute; but it is not contended that the work was not done, or was not properly chargeable against the county, or that the charges were too high, or that the Grand Jury were not clearly authorised to make it under section 142, if not under section 47. Under these circumstances, I am of opinion that, even supposing it to be erroneous in not referring to the proper section of the statute, yet that we are warranted in exercising our discretion, and refusing the writ upon that ground.

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I also think that, as to the other nine presentments, the order for the *certiorari* should be made absolute, without costs.

HAYES, J.

I concur in the judgment of the Court, that the *certiorari* ought to issue; but as I do so on grounds somewhat different from those which have been relied on by my LORD CHIEF JUSTICE and my Brother O'BRIEN, this will be my apology for stating my views more at large than would otherwise have been necessary.

All the presentments complained of (save two) are in fact re-presentments, for arrears of cess which had been accruing due and accumulating for a succession of years, until the amount of such arrears had at length reached the startling sum of £11,872. 14s. 6d. These moneys were applicable chiefly to the payment of contractors and other persons, for works performed for, and services rendered to, the county in bygone years. As it would have been idle to suppose that such a sum could be raised by a single presentment, the Grand Jury have thought it right, in their several presentments, to set forth that the moneys therein mentioned shall be raised by twenty successive instalments. It is also to be observed that of this sum of £11,872. 14s. 6d., which forms the subject of re-presentment, a sum of £5936. 7s. 3d., or one moiety thereof, has been presented to be raised off the county at large, while the residue has been presented

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Of the remaining two presentments, one is for a small sum of £14. 0s. 6d., to Mr. Bole, for advertising Grand Jury Cess Bill, printing notices of same, and names of contractors; and the other is for £500, to Mr. Neal Davis, the solicitor to the Grand Jury, "to meet the expenses of the Bill now before Parliament, in relation to the arrears of county cess."

These presentments were all made by the Grand Jury at the Spring Assizes 1861, without any previous application to Presentment Sessions; and were, in due course, flated by Mr. Baron Deasy, the then going Judge of Assize, without any objection whatever having been made before him.

Shortly afterwards, the treasurer issued his warrant for the imposition and levy of county cess, to the amount of all the presentments at that Assizes; and, while this was in course of collection, this Court was pleased, on the last day of Trinity Term, and upon the application of Mr. David Rutledge, a cess-payer of the barony of Kilmaine, to grant a conditional order for a *certiorari*, to remove these ten presentments into this Court, with a view to their being quashed, as illegal.

Upon the motion to make absolute the conditional order, several objections have been made to the presentments, which may be classed as follows:—

First—That the presentment to Bole was unauthorised, and ought to be quashed.

Secondly—That, for a similar reason, the presentment to Neal Davis ought to be quashed.

Thirdly—That several of the presentments are null and void, by reason that the Act, and section of the Act, under which they are authorised to be made and flated, have not been inserted on the face of the presentment, as required by the 6 & 7 W. 4, c. 116, s. 127.

Fourthly—That money, re-presented as unpaid arrears, cannot be made payable by instalments.

Fifthly—That the Grand Jury have made re-presentments of

these moneys without any affidavit having been laid before them, as required by 6 & 7 *W.* 4, c. 116, s. 145. M. T. 1861.  
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And, in addition to these, another objection has suggested itself to a Member of the Bench, viz. :—

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Sixthly—That money, which forms the subject of re-presentment, cannot be presented upon the county at large; but on some barony or other lesser denomination within it.

All these objections, save the first and last, have been fully discussed at the Bar; and although I am very far from thinking that a decision on the validity of such objections ought to rule the present motion, yet it is plainly of importance that the several questions raised should be considered, not merely with reference to their own intrinsic merits, but also as affording ground for our interference by *certiorari*.

The presentment to Bole, being for a small sum, and a remuneration for work actually done, has, with good taste, been but faintly resisted. It is not worth while therefore to give any opinion as to its strict legality; although the concluding words of the 142nd section of the General Grand Jury Act would go some way to authorise it.

But the presentment to Neal Davis stands on a different footing. It does not appear to be for the purpose of reimbursing that gentleman for money actually expended, or work actually done as a solicitor, or, to use the language of the Act, "for money or costs incurred;" but as a round sum, to be handed to him to meet expenses in Parliament, when and as they might arise or be called for. In my opinion, that presentment cannot be sustained, as was sought, on the part of the Grand Jury, by the 16 & 17 *Vic.*, c. 136, s. 6. It was in fact wholly *ultra vires* of the Grand Jury. They had no jurisdiction to enter on such a matter: *Regina v. Bolton* (a).

As to the non-insertion of the authorising statute on the face of the presentments, three statutes have been cited, viz., the 6 & 7 *W.* 4, c. 116, s. 145; the 7 *W.* 4, and 1 *Vic.*, c. 2, s. 15; and the 19 and 20 *Vic.*, c. 63;—all of which are couched in affirmative language, to the effect that "it shall be lawful for the Grand Jury" to

(a) 1 Q. B. 66, 74.

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re-present, &c. The first statute deals with two classes of cases, viz., those in which the money has not been paid by the cess-payer to the collector, and those in which, that having been paid to the collector, he has failed to pay it over. With this latter class we have nothing to do at present; and, as to the other class, the effect of the 6 & 7 W. 4 was to make the arrear of any individual cess-payer re-presentable; but only on the whole of the very barony, parish, or townland on which it was originally imposed and required by the warrant to be levied. The Act of the 7 W. 4 and 1 Vic. enlarges the discretionary power of the Grand Jury, and enables them to assess the money *on any part* of the denomination on which it was originally imposed. And the statute of the 19 & 20 Vic., while limiting the discretion of the Grand Jury, seems anxious nevertheless to carry out the policy hinted at in the 7 W. 4 and 1 Vic.; and accordingly enacts that the cess shall, if possible, be levied out of the defaulting tenement; and if that cannot be ascertained and made available, then that the re-presentation shall, in its area of taxation, follow the original presentment. The objects and policy then of the Legislature, as to the imposition of the tax, being so different in these several Acts, I am of opinion that re-presentments, of money in arrear for county cess, ought now to be deemed as made under the last Act, the 19 & 20 Vic., c. 63, s. 6, and ought to be so marked and inscribed.

The next question is, as to the authority of the Grand Jury to make the moneys re-presented payable by instalments. The 69th section of the Grand Jury Act, in dealing with the construction of public works, authorises the Grand Jury to make a presentment, for the required purpose, of an adequate sum, and to direct that the money shall be raised by instalments—a very reasonable provision,—so that the expense should be shared by those who are to share the benefits of the work. And it certainly would not be unreasonable if, in this case, the Legislature were to authorise the levy of those arrears, the defaults of former cess-payers, and the accumulations of several years of famine and general distress, by gradual payments by instalments, rather than overwhelm the landholder of the present day by a weight of taxation

not induced by his own delinquency, and which, by crushing him, would rather increase than alleviate the pressure of the public burdens. But has the Legislature done so? The 145th section enacts that all moneys re-presented as arrears, or presented as collectors' or treasurers' defaults, "shall be levied in the same manner, "and subject to the same rules, regulations, provisions, and powers "as any money to be levied by virtue of this Act is to be subject." And the 7 *W.* 4 and 1 *Vic.*, c. 2, s. 15, when speaking of re-presentments, enacts that they "shall be levied in the same manner, and "subject to the same rules, regulations, provisions, and powers as "any other sums of money presented by any Grand Jury." There is no corresponding clause in the 19 & 20 *Vic.*, c. 63; and as there is nothing in the policy of that Act at all antagonistic to this provision, I am of opinion that the Legislature intended that so reasonable a provision should not be interfered with, and that it remains still in force: and consequently that the presentments are unobjectionable on the ground suggested. This construction is also in conformity with that familiar and well-established principle that, where there are two statutory enactments, both in the affirmative, the latter shall not repeal the former, unless they cannot stand together: *Com. Dig. Parliament R.*, 9; *Ex parte Warrington (a)*.

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The next objection is, that the Grand Jury has re-presented without having had before them the affidavit required by the 6 & 7 *W.* 4, c. 116, s. 145. Having already intimated an opinion that it is under the Act of the 19 & 20 *Vic.* that re-presentments are properly made, I have only to remark that, as a part of the preliminary machinery which is to be set in motion, this Act has provided a *viva voce* examination of the collector, and a ten days' publication of a list of the defaulters; and it appears to me that this is in substitution for the previous machinery, of the affidavit of the collector, which, in my opinion, is no longer necessary.

But then comes the question, as to the right of re-presentment on the county at large. In my opinion this cannot be done, and that presentment ought not to have been made.

Such being my opinion upon the several objections made, the next

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question is, ought we, in respect of any, and which of these objections, to issue our *certiorari* to remove the presentments affected, with a view to the quashing of them?

Now it is to be observed, that a writ of *certiorari* is not issuable as of right, but in the exercise of the sound discretion of the Court; as Lord Denman has said, in *The Queen v. The Manchester and Leeds Railway Company* (a):—"The conduct of the party applying may be such as to preclude him from being entitled to it." So also, if this Court be of opinion that substantial justice has been done in the Court below, although there may have been irregularities in the proceedings, the writ will be refused: *Rex v. Denbighshire Justices* (b); *Rex v. Bass* (c).

So also the writ will not be granted to a party who has lain by and acquiesced, or has not availed himself of the proper tribunal at the proper time: *Regina v. South Holland Drainage* (d); *Regina v. McKay* (e); *In re Kearney* (f).

The presentments complained of were made by the Grand Jury, after a public discussion in presence of the cess-payers, while sitting in open Court at the Assizes, and before the opening of the Commission. No objection was then made to them by Mr. Rutledge, or, so far as appears on the affidavits, by any individual whatever. On the opening of the Commission, and pursuant to the public notice in the Circuit-lists, and the well-understood practice at the Assizes, the business of the presentments, and the fiatting of them, was taken up by the Judge. All persons having objection to any presentment were called on to make it. No objection was made; and, as a matter of course, all the presentments in question were fiattd: or, in other words, the Court pronounced its judgment on each presentment, that the money therein mentioned should be assessed and levied pursuant thereto.

It is a cardinal principle of our law, that every objection ought to be made at the earliest opportunity; and, if it had been so made in this case, there is no doubt that the learned Judge, on having

(a) 8 Ad. & El. 413, 426.

(c) 5 T. B. 251.

(e) 2 Ir. Law Rep. 16.

(b) 1 B. & Ad. 616.

(d) 8 Ad. & El. 429.

(f) 11 Ir. Jur. 236.

any valid objection pointed out to him, would have stayed his fiat, and have given such directions to the Grand Jury, while still empanelled, as he thought most conducive to the public interests.

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And what are the excuses suggested by Mr. Rutledge for not having made his objection in its proper time and place, and for having lain by until the last day of Trinity Term before he moved in the matter? He says he was not at the Assizes at all, and was not aware of the presentments being made until after the Assizes; and that a report was afterwards circulated in the county that the re-presentments were traversable at the next Assizes. It is not suggested that the Grand Jury, or any member or officer of that body, was in any way ancillary either to the keeping Mr. Rutledge away from the Assizes, or to the spreading of the report alluded to, and to which Mr. Rutledge gave too ready credence. If that gentleman had given his attendance before the Judge, and suggested that the presentments were defective, in not having the statute accurately set forth upon them, the defect could at once have been cured, by a more correct presentment being then and there made and fiatd. Mr. Rutledge ought not therefore here to be allowed to insist on that objection; and thus secure for himself, by his *laches*, an advantage which he could not have had if due diligence had been used by him.

But it may perhaps be said that, allowing this to be a good answer to those objections which might have been cured by the Grand Jury at the Assizes, it does not hold good with respect to those which, if made at the Assizes, must necessarily have been fatal to the presentment, as the omission of a necessary preliminary to the presentment. Thus, I take it to be conceded that, while the 19 & 20 Vic., c. 63, s. 6, was the statute authorising the re-presentment, there was in fact no publication of the list of arrears prior to the Assizes, as required by that statute. I own at once the weight of this objection; for, upon referring to the statute, and having regard to the negative words in that enactment, I think it plain that, unless the lists have been published,



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as there required, the Grand Jury have no authority whatever to entertain the matter; and have no more jurisdiction to make a re-presentment for arrears than they would have to present for a public work which had not been approved of at Presentment Sessions, or than a Court which had only appellate jurisdiction would have to act originally: *Rez v. Somersetshire Justices* (a); or than a Court which could only act on complaint would have a right to act without a complaint: *Regina v. Buckinghamshire Justices* (b), as mentioned by Lord Campbell, in *Regina v. The Metropolitan Board of Works* (c), when commenting on *Regina v. Bolton* (d):—This is “a case in which a preliminary fact has to be ascertained, before jurisdiction attaches.” That preliminary fact is the publication of the lists. It may however be said that, by maintaining this doctrine, we shall be going behind the presentment, in order to get at an objection which does not appear on the face of it. I have only to say that, in my judgment, that rule does not extend to a matter which is the very foundation of the Grand Jury jurisdiction. There being then a clear want of jurisdiction, as well in the Grand Jury as in the Judge of Assize, I think the *certiorari* ought to go; and that, for this defect, eight of the presentments ought to be quashed.

The sole remaining presentment is that to Mr. Neal Davis. I have already stated that, construing this presentment as I have done, and as I think it ought to be construed, it appears to me that it was wholly unauthorised. The Grand Jury had no power to dispose of the public money for any such purpose. We are relieved therefore from all questions of form and procedure; and I am of opinion that a writ of *certiorari* ought to issue for the removal of that presentment also.

FITZGERALD, J.

I concur with my LORD CHIEF JUSTICE and my learned Brethren, and am in the position of being able to adopt the reasons given by all of them. We are not infringing the rule which forbids

(a) 5 B. & Cr. 816.

(b) 3 Q. B. 800, 807.

(c) 4 Jur., N. S., 25.

(d) 1 Q. B. 66.

us to go behind the presentments themselves; every ground upon which we decide this case is substantial, and goes to the merits of the case. We are giving no weight to any mere technicality, but are deciding upon the merits. As to the presentment for the costs incurred by Mr. Davis, it is plain on the face of it that the Grand Jury had no authority to make it; and the omission of the proper reference to the statute is important and substantial, because, if such reference had been made, even a Grand Juror would have been able to see that there was no jurisdiction to make the presentment until the taxed bill of costs had been produced.

Then, as to the presentments, on the county *at large*, for arrears, a gross injustice might be effected if we did not give effect to the objection. As to the validity of that objection I have no doubt, and it is observable that, although the attention of the Counsel for the Grand Jury was called to it at the close of the case, and they were offered an opportunity to argue it, they declined to do so. I also agree with the other Members of the Court, that no authority exists to re-present arrears to be levied by instalments. The authority of the Grand Jury is the creation of statutes only, and if it exists, must be found in the statutes; and I concur in the opinion that in none of the statutes can any such authority be found. And then a power to re-present arrears is one the exercise of which must be watched with jealousy, because it is one enabling the Grand Jury at any time, instead of meeting immediately their own proper burdens, to cast a proportion of them on posterity, as in this case, persons coming into possession of property ten years hence would be called on to pay instalments of a sum with which they had had nothing to do. Then, as to the omission of all mention of the statute, or of the section of the statute under which the presentment was made, that might in many instances be a technical objection merely, and I would be disposed to give little force to it, if, in this particular case, it was merely a matter of form which could have been remedied at the Assizes. But here this objection seems to me to be one of a character going to the merits of the case. For if, at the Assizes, attention had in fact been called to the omission, it could not have been rectified. It consists not merely in omitting

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to refer to the section of the statute under which the presentment is made, but in also omitting all reference to the 19 & 20 *Vic.*, c. 63, under which alone this re-presentment could properly have been made. Had it been pointed out to the Grand Jury that this re-presentment was made under the 19 & 20 *Vic.*, c. 63, the error could not have been corrected, from the want of time to comply with an essential preliminary, namely, the publication of notice under which every rate-payer might come in and dispute the propriety of such re-presentment.

The only other portion of this case upon which I wish to make any observation is, as to the delay which has taken place. That delay is divisible into two periods; first, the *laches* in not making the objection at the Spring Assizes; and, secondly (when that *laches* had occurred), not bringing forward this application before the Court until the last day of Trinity Term. On account of this delay, my Brother HAYES and I, before whom the *ex parte* application for a conditional order for the writ was made, had some hesitation in granting it. The objection as to the neglect at the last Spring Assizes does not appear to me to be well-founded; for the whole course of the conduct of the Grand Jury upon that occasion was calculated to mislead the rate-payers, instead of to give them an intimation of their intention to re-present these arrears. At an early period, the impracticability of re-presenting the arrears at the proper time became obvious; and accordingly the Grand Jury applied to Parliament for the necessary powers. I remember the several Bills which were brought before Parliament to give them authority to re-present that which, it was assumed, they could not enforce under the existing law. We find, at the Spring Assizes in 1861, a Bill was then before the House of Commons, having for its object to give additional powers to re-present these arrears; and a presentment was passed at the Spring Assizes 1861, for £500, to enable Mr. Davis to prosecute that Bill. Therefore, so far from any statutable notice having been given under the 19 & 20 *Vic.*, c. 63, we find on the contrary that these gentlemen were then seeking for additional powers from Parliament. To be sure, an abstract of the presentments is read at the Assizes

to give an opportunity to each rate-payer to come in and object. But if abstracts of these re-presentments had been read, one after the other, there was nothing in them to arouse the attention of any rate-payer; and Mr. Rutledge swears that he did not hear of these re-presentments until after the Assizes were over. I therefore do not think that the neglect to make the objection at the Assizes is of great weight. But there *was* considerable delay from the first day of Easter Term, when the application might have been made to the Court, to the last day of Trinity Term, when it was actually made. If this had been a case in which Mr. Rutledge alone was affected, if he appeared here to defend merely his own private rights, and yet had been guilty of this delay, that would have been a ground on which we might have refused the application; though it seems to me that the writ of *certiorari* so nearly approaches the confines of matter of right, that we might perhaps have granted it even in that case. But this is a case of public importance, affecting the rights of large numbers of persons, and affecting the rights of persons who are to come into possession of property years hence; and it would be very strong to say that we are to stay our hands because this delay, from which no public injury could arise, has occurred. My Brother HAYES and I therefore did not do so, but made the conditional order; and we are enabled now, on substantial grounds, to dispose of the objections which have been made.

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NOTE.—In Hilary Term 1862, the nine presentments were, pursuant to the exigency of the writ, brought up, and quashed without discussion, as the Counsel for the Grand Jury declined to argue the case further.—REPORTER.

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Exchequer.

## STRATTEN v. LAWLESS.

Jan. 29, 30.

Feb. 1.

(Exchequer.)

A Sheriff seized the goods of E. S., under a *fi. fa.*, delivered to him by L., to whom A. S. was indebted. The writ contained the following indorsement, made by L.:—"The defendant is a widow lady, and resides at No. 15 Mespil parade, in the county Dublin, where she has goods and chattels."

*Held*, that L. was made liable, as a trespasser to E. S., by the above indorsement.

THIS was an action in trespass, brought by Emma Stratten against E. D. Lawless, for breaking and entering the plaintiff's house, and seizing certain goods therein. The action was tried before FITZGERALD, B., at the Sittings after Michaelmas Term 1863.

It appeared in evidence that, in the month of January 1860, the plaintiff was residing at No. 15 Mespil-parade, Dublin. The house and furniture had been assigned to her, in the preceding year, by her mother. The plaintiff was not indebted to the defendant. Her mother Alicia Stratten, who was not in Ireland at the time of the seizure, owed him £50 upon a bill of exchange.

Upon the 21st of January 1860, the defendant sued out a writ of *fi. fa.* against Alicia Stratten, and delivered it in person to the Subsheriff of the county of the city of Dublin; at the same time indorsing upon it—"The defendant is a widow lady, and resides at No. 15 Mespil-parade, in the county of Dublin, where she has goods and chattels.—R. D. LAWLESS."

A seizure was made upon the 23rd of January; and, upon the same day, the plaintiff made a declaration that the property seized belonged to her. The goods were restored to the plaintiff in about twelve days after the seizure, upon bail being given for them. In an interpleader issue, between the plaintiff and the defendant, relative to the goods seized, the plaintiff obtained a verdict.

At the close of the plaintiff's case, the Counsel for the defendant called for a nonsuit, which his Lordship refused; and upon their stating that they intended to call no witnesses for the defendant, his Lordship allowed the plaintiff's Counsel to examine the defendant, who stated that he did not say anything to the Sheriff when delivering to him the writ indorsed as above; he had seen the plaintiff

on but one occasion, in the year preceding the seizure; he believed that Alicia Stratten had goods at Mespil-parade, and he wished her goods to be seized; he did not know that the plaintiff had any goods at Mespil-parade; he had not interfered in anywise in the execution, further than putting the indorsement upon the writ, and appearing in Court at the trial of the interpleader issue; he acted as his own attorney. His Lordship told the jury that there was no evidence of any authority given by the defendant, previous to the seizure, to seize any goods save those of Alicia Stratten; but if they believed the seizure was made for the use of the defendant, and that he subsequently sanctioned and adopted the seizure—of which his Lordship thought there was strong evidence,—the defendant was liable. The jury found for the plaintiff, with £25 damages.

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A conditional order to enter a nonsuit, or a verdict for the defendant, pursuant to leave reserved, having been obtained by the defendant—

*D. C. Heron* and *W. J. O'Driscoll* now showed cause.

The defendant's indorsement upon the writ was a plain direction to the Sheriff to go and seize the goods within No. 15 Mespil-parade. The Sheriff had no discretion in the matter. The indorsement, by the plaintiff himself, distinguishes this case from *Woolen v. Wright* (a) and *Wilson v. Tarnman* (b). Those cases deal with the ratification of the Sheriff's acts subsequent to the seizure. Here the indorsement amounts to a previous authority to the Sheriff: *Com. Dig., Trespass, C. 1.*

*W. J. Sidney*, contra.

The person who sues out a writ must put upon it the place of abode and description of the party against whom the writ is issued: 106th Gen. Order 1854. That indorsement does not amount to a command; it is only a representation that the execution creditor thinks the debtor has goods at such a place, and that he wishes the Sheriff to go to that place and seize the goods, if the debtor has

(a) 1 Hurl. & Colts. 554.

(b) 6 M. & G. 236; S. C., 6 Scott N. R. 894.

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*Exchequer.* v. *Wooler* (a).  
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 LAWLESS. *O'Driscoll*, in reply, cited *Jarmain v. Hooper* (b); *Rowles v. Senior* (c); *Bates v. Pilling* (d).

PIGOT, C. B.

The facts upon which the question in this case is to be decided lie within a very narrow compass :—The plaintiff claimed certain goods, seized under a *fiery facias*, on a judgment against Alicia Stratten, in an action in which the present defendant (an attorney) was plaintiff, suing in person, and acting as his own attorney. The writ of *fiery facias* was delivered to the Sheriff by the present defendant, with an indorsement upon it, in the present defendant's handwriting, in these terms :—" The defendant is a widow lady, "and resides at 15 Mespil-parade, in the county of Dublin, where "she has goods and chattels.—R. D. LAWLESS." The present plaintiff claimed the goods; and, upon her claim, the Sheriff obtained the usual interpleader order. The present defendant appeared upon the hearing which followed that order; on which hearing affidavits were used, showing the present plaintiff's claim to the goods; and the present defendant then became defendant, and the claimant plaintiff, in an issue, which the Court directed for the purpose of determining whether the plaintiff was the owner of the goods. The plaintiff succeeded in that issue; and brought this action, for the illegal entry into her house, and seizure of her goods.

At the close of the evidence, at the trial, the learned Judge, in summing up, told the jury that, in his opinion, there was no evidence of any authority, given by the defendant previous to the seizure, to seize any goods save those of Alicia Stratten (the defendant in the judgment); but he told them that, if they believed the seizure of the goods in question was made for the use of the defendant, and that he subsequently sanctioned and adopted the

(a) 29 Law Jour., Q. B., 129; S. C., 6 Jur., N. S., 444.

(b) 6 M. & G. 827; S. C., 7 Scott N. R. 663.

(c) 8 Q. B. 677.

(d) 6 B. & C. 38.

seizure—of which there was, in his opinion, strong evidence,—he (the defendant) would be liable. H. T. 1864.

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The plaintiff's Counsel objected to the direction that there was no evidence of antecedent authority, and insisted that the learned Judge should direct the jury that there was such authority, or leave that question to them.

The defendant's Counsel insisted that the learned Judge should direct a verdict for the defendant, on two grounds—that there was no evidence of antecedent authority, and no evidence that the act was done for the plaintiff's use, or that he subsequently sanctioned it.

The learned Judge reserved liberty for the defendant to move for a nonsuit, or that a verdict should be entered for him, if the Court should be of opinion that there was no evidence that the trespass was done for the defendant's use, or that he subsequently sanctioned and adopted it.

The jury found a verdict for the plaintiff.

A conditional order was obtained, that the verdict should be set aside, and, instead thereof, a verdict for the defendant, or a nonsuit, be entered, pursuant to the leave reserved by the learned Judge at the trial. The case has been argued; and we are of opinion that the cause shown against the conditional order should be allowed, and that the verdict ought to stand.

We have looked into the authorities (which were not brought before the learned Judge at the trial), and, upon the first point, there is considerable authority, irrespective of recent decisions, for holding that what the defendant did in this case, independently of any subsequent sanction of the Sheriff's act, made him a tort-feazer as well as the Sheriff, and answerable for the Sheriff's act, on the ground that he procured it to be done. In order to render the defendant liable, it was not necessary that he should have deputed the Sheriff to be his agent, in the ordinary sense of that word. In that sense the Sheriff could not be his agent in the execution of the process of the case. The Sheriff does not become the mere agent of the party, and cease to be the officer of the Court, or cease to be invested with the powers and responsibilities of his office,



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because he is authorised or directed, by the party in the execution of the writ, how or where he shall execute it. The manner in which the plaintiff in the writ becomes answerable for the act of the Sheriff, as a joint tort-feazer, is very clearly stated in the judgment of Lord Chief Justice De Grey, in *Barker v. Braham* (a). There the liability of the plaintiff, and of the plaintiff's attorney, in a writ of *capias ad satisfaciendum*, arose from an arrest upon the writ, which the Court set aside. But the general principle is thus stated by Lord Chief Justice De Grey, in dealing with the liability of the attorney:—"All the books say that all "are principals in trespass: *Co. Lit.*, s. 7, a; 2 *Inst.*, p. 183. "Procuring, commanding, aiding, or assisting, makes one a trespasser: *Bro., Trespass*, pl. 148, 232, 307; 1 *Salk.*, p. 409. A "servant, keeping the key of a room, knowing that a man is imprisoned therein, is a trespasser. One assenting to a trespass after "it is done is a trespasser: *Bro., Trespass*, pl. 113, 256, 265. "To apply what is said and laid down in the books upon this "subject to the present case, they say whoever procures, commands, "assists, assents, &c. &c., is a trespasser. Here the client commands "the attorney, the attorney actually commands the Sheriff's officer. "The real commander is the attorney; the nominal commander is "the plaintiff in the action: so attorney and client are both principals."

In *Menham v. Edmondson* (b), goods were taken under a writ of execution, at the suit of the defendant in that action, who had accompanied the Sheriff's officer, to see the writ executed. Lord Chief Justice Eyre, after saying that the fact of the defendant's accompanying the officer decided the point, added:—"By the case "cited (c) it appears that trover may be maintained against the "party himself, if he give a bond to the Sheriff; because giving a "bond is equal to intermeddling. Actual intermeddling therefore "must be equal to giving a bond."

In 2 *Rolle's Abridgment*, p. 553, tit. *Trespass, P*, and 2 *Viner's*

(a) 3 Wills. 377.

(b) 1 Bos. & Pul. 369.

(c) *Bush v. Barker*, Buller's N. P. 41; S. C., Cunningham, 130.

*Abridgment*, pp. 458-459 (same title and letter), the law is abstracted from the Year Books in the following proposition:—

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"1. If a man sues a plaintiff in a Court, and, upon the attachment, the bailiff takes the goods of a stranger, without the showing or procurement of the plaintiff, trespass does not lie against him; for he is no party to the tort."

"2. The same case it is where one man is taken for another by the Sheriff, *ut supra*; false imprisonment does not lie."

"3. But otherwise it is, if he procures the bailiff to take those goods, or shows them to him: 11 *H. IV*, 90."

"4. So it is if he procures the Sheriff to take one man for another, or shows him to him."

"5. So, in a replevin, if the plaintiff shows the beasts of a stranger for his own beasts, and the Sheriff takes them, trespass lies against the plaintiff."

In the Year Book, 11 *H. IV*, 90, the law is stated with brevity and clearness:—"Suppose that a Sheriff, by a *capias*, takes one B in the name of S, he will not have an action of false imprisonment against the party who sues the action, unless the Sheriff takes him *by showing him, or by his request (de son prier)*." And in another part of the same case it is said:—"This case is not like the case where the Sheriff, *by procurement of the party*, by force of a *capias*, takes a man who is not named in the writ: in that case the Sheriff is guilty of false imprisonment; and the party also." In the case now before the Court, the defendant did not personally go with the Sheriff and point out the goods to be seized. Had he walked with the Sheriff to the plaintiff's house, and pointed out the house and the goods to the Sheriff, without more, he would have been within the decision in *Menham v. Edmondson* (a). I see no difference, in effect, between his pointing out the goods in the Sheriff's presence, and pointing them out by language so precise as that contained in the indorsement upon the writ in the case now before us. That indorsement stated the name of the defendant in the writ; it stated that she lived in a particular house, described by the street and number; and it stated that the defendant's goods

(a) 3 Bos. & Pul. 369.

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were in that house. He could not more clearly "show" the goods to the Sheriff, if he had accompanied the officer to the place of seizure. I should be of opinion therefore, irrespectively of recent decisions, that there was enough in the present case so to connect the defendant with the act of the Sheriff as to make him a co-trespasser. One of these decisions however, referred to by Mr. *O'Driscoll*, appears to be directly applicable to the facts with which we are now dealing. In *Rowles v. Senior*,—*Gandel and Chesshyre (a)*, the defendant Chesshyre, who acted as attorney for Gandel, the plaintiff in a writ of *fiery facias* (and who also appeared to have had assigned to him, from the plaintiff Gandel, the debt secured by the judgment on which the writ issued), delivered the writ to the Sheriff, with the following indorsement:—"The defendant resides at Wolverton, in the county of "Bucks, and is an innkeeper. Levy £177. 9s. 1d., with interest, "as within mentioned, together with £1. 15s. 4d. for costs of "execution, besides," &c. The writ was executed, by the seizure of the goods of the plaintiff Rowles. The defendant in the writ, Dore Dare, was the plaintiff's son-in-law, and resided in the house with him, but had no property in the goods. At the trial, before Mr. Justice Patteson, it was contended, for the defendant Chesshyre, that, in delivering the *fi. fa.* to the Sheriff, he had done nothing which could render him liable for the trespass; and *Jarmain v. Hooper (b)* and *Sowell v. Champion (c)* were cited. Mr. Justice Patteson thought that the special direction in the *fi. fa.* materially distinguished the case before him from those cited; he therefore ruled the point against the defendant, but reserved leave to move to enter a verdict for him. There was accordingly a verdict for the plaintiff, against Senior (the Sheriff) and Chesshyre (the attorney)—Gandel, the original plaintiff, having allowed judgment to go by default. The Court, on argument upon the point reserved, upheld the verdict. Lord Denman, C. J., in giving judgment, said:—"The principle of "*Sowell v. Champion* extends only to this, that the attorney is

(a) 8 Q. B. 677.

(b) 6 M. & Gr. 827.

(c) 6 Ad. & Ell. 407.

"not a trespasser unless he actually directed the wrong goods to be seized, or the seizure to be made in a wrong place. The whole question here is, whether the attorney did so; and I think he did. By the indorsement, he, in effect, desires the Sheriff to go to an inn at Wolverton, kept by Dare, to make the required levy. He leads the Sheriff to believe that Dare is the master and owner of the house in question; and the levy is accordingly made there. My conclusion on the point is greatly strengthened by the fact that the defendant had become assignee of the debt, and was to take the fruits of the levy. This case does not bring the rule of law into question, but only its application." Mr. Justice Patteson closed his judgment by saying:—"The only question being, whether Chesshyre took part in directing a levy on the plaintiff's goods, I think that was rightly decided at the trial." Mr. Justice Williams said:—"In each case it is a question of evidence; and I agree the result here was right." Mr. Justice Wightman said:—"The only question here is, whether the attorney caused the plaintiff's goods to be seized. The language of the indorsement could be taken only in one way;"—and he proceeds to show how the Sheriff was led by the indorsement to seize the goods in question.

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The present case is not, in my opinion, distinguishable from *Rowles v. Senior*. There indeed there were, in the indorsement, the words "levy £177. 9s. 1d.," &c. But the delivery to the Sheriff of the writ directing him to levy the debt off the goods of the debtor, conveys a request to "levy," as much as the use of that word. It is in the other part of the indorsement that the intimation to the Sheriff is given, which made the defendant "take part in" directing a levy at the house described as the house where the defendant in the execution resided, and where she had goods.

In *Jarmain v. Hooper* (a) the action (trespass) was brought against the Sheriff and the plaintiff in a writ of *fi. fa.*, for the seizure of goods of *Joseph Jarmain* the elder, who was not the defendant in the writ. There were several pleas of justification for the Sheriff, which failed; but the defendant *Heenan*, the

(a) 6 M. & Gr. 827; S. C., 7 Scott, N. R., 663.

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**LAWLESS.** plaintiff in the execution, pleaded only *not guilty*. The writ, which was against the plaintiff's son, was indorsed by Heenan's attorney in these words:—"The defendant is an upholsterer and "bill-broker, and resides at No. 3 Prospect-place, Christchurch-street, Chelsea, and No. 38 Leicester-square, Middlesex." The writ was lodged with the Sheriff; and under a warrant issued pursuant to the writ, the plaintiff's (Jarman's, the father's) goods were seized at No. 3 Prospect-place, Christchurch-street, Chelsea. At the trial it was contended for *Heenan*, the execution creditor, that inasmuch as he had not interfered in the original action further than by giving the attorney instructions to sue, he was not liable as a trespasser for the alleged wrongful seizure by the Sheriff. Lord Chief Justice Tindal left it to the jury to say to what amount of damages the plaintiff was entitled; adding, that no justification had been pleaded by the defendant Heenan. On behalf of Heenan, a rule *nisi* for a new trial was obtained, on the ground of misdirection; and, after argument, the Court upheld the verdict. Lord Chief Justice Tindal, in the course of the argument, stated the question which arose in the case of *Heenan* thus:—"The broad ground as "to *Heenan* is, that he never directed the attorney to enter the "wrong house. I gave no opinion at the time; but said that as "the case was nearly closed, it might as well go to the jury, and "that the law as to this point could be decided by the Court afterwards." In the discussion, it was not contended that the indorsement on the writ was not such a direction to the Sheriff as would make the attorney answerable. The question was, whether *Heenan* was answerable for that act of his attorney. And the Court held that he was. In the case now before us, the present defendant was, when he indorsed the writ, both client and attorney, as was the plaintiff, in effect, in the case of *Rowles v. Senior*. These decisions are in my opinion direct authorities for holding that there was at least *evidence* at the trial, that the present defendant authorised the Sheriff to execute the writ at the house of the present plaintiff, by a seizure of the goods which were there; and that the defendant thereby became a participator in the Sheriff's trespass.

The case of *Childers v. Woolen* (a) was relied on for the defendant. That was not an action of trespass brought against the attorney or against the plaintiff in the writ of execution, by the party complaining of a wrongful seizure; it was an action against the attorney for the plaintiff in a writ of *fi. fa.*, brought by the Sheriff to obtain indemnity for damages which were recovered against him by reason of his seizure of the goods of the wrong party in dealing with that writ. The declaration contained several counts; but the main question turned upon the third count, which averred, that the defendant (the attorney in the writ of *fi. fa.*) having issued the writ, "directed and required the plaintiff" (the Sheriff) "to wit, by the indorsement in the writ, to execute the writ by seizing the goods and chattels of W. F., who then resided at Redcar, as and for the goods and chattels of W. F., in the said writ named." To this the defendant pleaded, in effect, that he indorsed the writ with no other intent than to furnish such information as he believed to be true, for assisting the plaintiff (the Sheriff) in ascertaining whether there were goods of W. F. within his bailiwick. It appeared at the trial that the writ, when delivered to the Sheriff, by the defendant in *Childers v. Woolen*, contained this indorsement:—"The defendant is a ———" (a blank being left for the defendant's calling), "and resides at Redcar, in your bailiwick." It appeared that in fact the defendant's son resided there, but that the defendant himself resided at Coatham, an adjoining town, but a distinct place from Redcar. The learned Judges of the Court of Common Pleas were all of opinion that the plaintiff could only recover (if at all) upon the third count, which alleged (in conformity, with the fifth count on which the House of Lords decided in *Humphreys v. Pratt* (b) that the "defendant required" the plaintiff to execute the writ by seizing the goods in question. Mr. Justice Wightman, differing from the rest of the Court, held that the terms of the indorsement amounted to a direction to the Sheriff, which brought the case within the decision of *Humphreys v. Pratt*. The Lord Chief Justice and the other Judges were of

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(a) 29 L. J., Q. B., 129; S. C., 6 Jur., N. S., 444. (Not reported in the series of Queen's Bench Reports).

(b) 5 Bligh, N. S., 154.

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opinion that the indorsement did not bear that import, but "was  
 "a statement by the attorney, for the purpose of affording infor-  
 "mation to the Sheriff,—leaving the Sheriff to his own discretion  
 "as to how he would act." The Lord Chief Justice, in his judg-  
 ment, observes upon the case of *Jarmain v. Hooper* (a), and  
 contrasts the indorsement in that case with the indorsement in  
 the case before him; showing that the former was much more  
 specific. He also refers to an argument of the plaintiff's Counsel  
 in *Jarmain v. Hooper*, in which Counsel relied upon the fact,  
 that upon the Sheriff's obtaining an interpleader order when the  
 plaintiff *Jarmain* claimed the goods, the execution creditor attended  
 the interpleader summons by his attorney, and insisted that the  
 goods were rightly seized, though, after the issue had been directed,  
 he declined to try the issue; and plaintiff's Counsel argued that  
 he therefore, by that act, ratified the seizure which was for his  
 benefit. The Lord Chief Justice then makes the following obser-  
 vations:—"Upon the argument of the case, the question was,  
 "whether the execution creditor was a trespasser by reason of  
 "the seizure by the Sheriff; and the learned Counsel for the  
 "execution creditor contended, that although the attorney, by his  
 "acts, might be a trespasser, yet that he could not make his client  
 "such; and he further argued, that the adoption of the seizure,  
 "by coming in under the interpleader rule, was an adoption, not  
 "by the execution creditor, but by his attorney, and that the  
 "attorney had no more authority to ratify the act than he had  
 "to commit it. As it is clear therefore that there was a ratifi-  
 "cation of the illegal seizure, which had been made for the benefit  
 "of the execution creditor, there was other evidence in that case  
 "besides the mere indorsement; and the point, whether the indorse-  
 "ment had the effect now contended for by the plaintiff, was not  
 "raised or decided in that action, nor was it necessary that it should  
 "be. We therefore think that *Jarmain v. Hooper* is not an  
 "authority for the plaintiff in the action, and that the defendant,  
 "for the reasons which are here stated, is entitled to the judgment  
 "of the Court." (b). With every possible respect for that most

(a) 6 M. &amp; Gr. 827.

(b) 29 L. J., Q. B., N. S., 140.

eminent and able Judge, I must say that, upon an examination of the case of *Jarmain v. Hooper* (a), it does not appear to me that the Court rested their judgment on the ratification by means of the interpleader order. Lord Chief Justice Tindal uses these words (b): —“As to the defendant *Heenan*, the only question in his case is, “whether he is bound by the act of his attorney in giving directions “to the Sheriff to take the goods of the plaintiff. That the plaintiff “in the original action is liable in trespass if, by *his own* order, the “Sheriff takes the goods of a stranger in execution, is clear law: 2 *Roll. Abr.*, 553, L (10, pl. 5). And it appears to us that *the* “direction given by the attorney is a direction given by the agent “within the scope of his authority, and binds the principal.” He then refers to the relation between client and attorney, and to the case of *Parsons v. Lloyd* (c). No part of the judgment refers to the topic of ratification. The case of *Childers v. Woolen* is an authority for holding that, upon such an indorsement on the writ as was there given, the person making the indorsement, without fraud or deceit, does not give such a direction as makes him answerable to the Sheriff for the consequences of the Sheriff’s acting upon the information contained in the indorsement; but it is not an authority for holding that by such an indorsement as that now before us, the party making it does not become a joint tort-feazor with the Sheriff, who acts in pursuance of such an indorsement, in taking the goods of the wrong party. It is singular that *Rowles v. Senior* does not appear to have been brought to the notice of the Court in *Childers v. Woolen*. In the present case the defendant was examined: he stated that “he considered there were goods of Alicia Stratten at Mespil-parade;” and he said that “he thought Mrs. Stratten had goods, and he wished her goods to be taken.”

It appears to me therefore that there was abundant evidence that the defendant authorised the seizure of the goods in question; and I am rather disposed to think, that the evidence being uncontradicted and unexplained (although the defendant, when examined for the plaintiff, had ample opportunity for explanation), and being all one

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(a) 6 M. & Gr. 827; S. C., 7 Scott, N. R., 663.

(b) 6 M. & Gr. 849.

(c) 3 Wils. 341.



H. T. 1864. way, would have warranted a direction to the jury to find for  
*Exchequer.* the plaintiff.

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I am also of opinion that there was evidence, in this case, of an adoption and ratification by the defendant of the Sheriff's act in the seizing of the goods, and that the Sheriff's act was capable of such adoption and ratification by the defendant. In the case of *Wilson v. Turnman* (a) it was ruled that, where a writ of *fi. fa.* is delivered to the Sheriff, without any indorsement pointing out the debtor or the goods, and where, upon a claim made by a stranger to the writ whose goods are seized under it, an interpleader issue is directed by the Court, on which the claimant as plaintiff succeeds against the execution creditor, who defends the issue unsuccessfully, asserting that the right goods have been seized, the execution creditor is not, under these circumstances to be considered as ratifying the Sheriff's wrongful act, by accepting and defending the issue. That decision was made upon the ground that the Sheriff did not, in the act of trespass complained of, assume to act for, or as the agent of, the plaintiff in the execution, but only as the officer of the Court. The same principle was applied under similar circumstances in *Woollen v. Wright* (b) by the Court of Exchequer Chamber. In each of these cases there was no indorsement indicating where the defendant in the execution, or his goods, would be found. And it is to be observed, that the same Court of Common Pleas, which determined *Wilson v. Turnman* (c) in Trinity Term 1843, decided in the Sittings in Banc after Michaelmas Term following, in *Jarmain v. Hooper* (d), that an indorsement pointing out the description and residence of the defendant in the execution was sufficient to make the attorney and the plaintiff in the writ of *fi. fa.* co-trespassers with the Sheriff. In the present case the writ was not only placed in the Sheriff's hands by the defendant, to be executed for his own benefit, but it also bore an indorsement, signed by the defendant, specifying to the Sheriff *the place where he should find both the residence and*

(a) 6 M. & Gr. 236; S. C., 6 Scott, N. R., 894.

(b) 1 Hurl. & C. 554.

(c) 6 M. & Gr. 236.

(d) 6 M. & Gr. 827.

*the goods of the debtor in the writ of fi. fa.* And the defendant, in his evidence at the trial, stated that he thought the debtor's goods were at that place, and wished the debtor's goods to be seized under the writ. The Sheriff therefore in seizing the goods, acted in pursuance of what was conveyed by the indorsement, and of what was wished and designed by the defendant. Upon the hearing of the interpleader order, the defendant, by the two affidavits referred to in it, and given in evidence at the trial, was apprised of the present plaintiff's claim; he in effect insisted that the Sheriff had acted rightly in seizing the goods at the place where, by the indorsement, he had stated that the execution debtor's goods would be found; and he accepted the defence of an issue under the interpleader order. It appears to me that, under these circumstances, there was evidence, and strong evidence, first, that the act of the Sheriff was *for* the defendant and *for his use* and benefit; and, secondly, that the defendant sanctioned and ratified that act. The indorsement was directly calculated to cause the Sheriff to seize, as the goods of Alicia Stratten the execution debtor, the goods indicated in the indorsement. It was, upon the defendant's statements in his evidence, intended by him to have that result. And there was therefore evidence, for the consideration of the jury, that the Sheriff acted, in the seizing of the goods, *for* the defendant as well as *for his use and benefit*; and further that the act which he so did was, by the defendant, subsequently sanctioned and ratified. In this view, the case is plainly distinguishable from *Wilson v. Turnman* and *Woollen v. Wright*.

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FITZGERALD, B.

In this case I am of opinion that I was wrong in telling the jury that there was no evidence of an antecedent authority in fact, on the part of the defendant, to seize the plaintiff's goods.

It seems to me that the cases of *Jarmain v. Hooper* (a) and *Rowles v. Senior* (b) show that the misdirection indorsed on the writ of *fi. fa.* by the defendant was evidence of such authority;

(a) 6 M. & G. 827.

(b) 8 Q. B. 677.

H. T. 1864. *Exchequer.* and that fact distinguishes the present case from *Wilson v. Turn-*  
*man* and *Woollen v. Wright*, relied on by the defendants.  
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The case of *Childers v. Woollen*, cited by Mr. *Sidney*, does not necessarily establish that, even in that case, the plaintiff might not have been liable as trespasser to the supposed execution debtor.

I am of opinion that I rightly told the jury there was evidence that the seizure was made for the use of the defendant. In truth, the same evidence, which I ought to have held was evidence of antecedent authority, was evidence that the act was done for the defendant's use; and the jury have found that it was so done in fact.

I think I also rightly told the jury that there was evidence that the defendant had subsequently sustained and adopted the act.

As the defendant's right to have a verdict entered for him depends on there being no evidence of the two latter matters, the cause shown ought, I think, to be allowed as to the rule for entering a verdict for the defendant.

The only question is whether, having regard to my misdirection to the jury, as to there being no evidence of antecedent authority, we ought to direct a new trial. But the defendant's contention at the trial was, that there was no evidence of antecedent authority, and he called on me so to direct; the plaintiff asserting that I ought to tell the jury that there was such evidence. Under these circumstances it would be a strong thing to direct a new trial. And as in point of fact the act being done for the use of the defendant, and subsequently being adopted by him, would be equivalent to antecedent authority, and might be pleaded as the defendant's command, I am further of opinion that no new trial should be granted. My misdirection might possibly have injuriously affected the plaintiff who has the verdict; it does not seem to me that it would have injuriously affected the defendant.

HUGHES and DEASY, BB., concurred.

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THE ATTORNEY-GENERAL v. THE GREAT  
SOUTHERN AND WESTERN RAILWAY COMPANY.

Nov. 21.

THIS case came before the Court upon a special case agreed upon between the parties.

*Walter Griffith* and the *Solicitor-General* appeared for the Crown.

*A. Brewster* and *J. Coffey*, contra, contended that the defendants could not be compelled to carry the baggage of a whole battalion at the rates specified in the 7 & 8 Vic., c. 85, s. 12, unless the whole battalion were conveyed by the Railway.

At the close of the argument, the Court stated that they were doubtful whether the Crown would be bound by their decision on the case as now before them; a special verdict, in the terms of the special case, was accordingly taken at the ensuing After-sittings.

FITZGERALD, B., now delivered the judgment of the Court.

The action in this case is brought to recover the sum of £12. 13s. 10d., being an alleged overcharge made by the defendants for the carriage, by their Railway, of certain public baggage, in the year 1862.

It appears from the special verdict found at the trial of the case, during the Sittings after last Hilary Term, that on the 6th of October 1862, an officer, seventy-nine soldiers, ninety-two women, and fifty-five children, of the 1st battalion of the 11th regiment of foot, together with the public baggage and arms of *the whole battalion*, amounting to 52 tons, 12 cwt. (no part thereof being gunpowder or other combustible materials), were carried by the defendants on their Railway, from the Kildare station to the station at Cork; but the rest of the regiment marched to Cork by the high-road. Admittedly the proper fare was paid for the officer,

"Public baggage, stores, arms," &c., &c., sent by Railway, in charge of any of her Majesty's forces specified in the 7 & 8 Vic., c. 85, s. 12, is "their baggage," no matter what may be the disproportion between the amount of baggage and the number of the force in charge of it, and must be carried by the Railway Company at the rates imposed by that section.

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 GENERAL to the station-master, for carriage of the public baggage, being the  
 v. proper amount, at the rate of two-pence per ton per mile; but this  
 G. S. AND W. sum was refused; and payment of the sum of £70. 19s. 9d., was  
 RAILWAY. demanded on behalf of the Company, which sum was finally paid  
 on behalf of her Majesty, under protest. The difference between  
 these two sums constitutes one item of the alleged overcharge.

It further appears that, in the month of July 1862, the guns and public baggage of the 8th brigade of the regiment of artillery (no part thereof being gunpowder or other cumbustible materials), together with twelve non-commissioned officers and soldiers of the regiment, and seventeen women and three children, being wives and children of soldiers of the regiment, were conveyed by the defendants on their Railway, from the Cork station to the Kildare station; but the other officers and soldiers of the brigade did not travel by the Railway, but marched by the road. The proper fare for the carriage of the officers, men, and women and children, who went by the Railway, having been paid, payment on behalf of her Majesty of £4. 1s. 9d., being admittedly the proper amount at the rate of two-pence per ton per mile, for the quantity carried, was tendered to the Company; but this sum was refused on behalf of the Company, and payment of the sum of £5. 9s. was demanded; which sum was finally paid to the Company, on behalf of the Queen, under protest. The difference between these two sums constitutes the remaining item of alleged overcharge.

The question we have to consider is, whether there was an overcharge in both or either of these cases. The solution of that question depends on the construction of the 12th section of the Act 7 & 8 Vic., c. 85; and it appears to be clear, that whatever be the ruling as to either item of charge, that ruling must govern the other.

It is a conceded fact, and found by the special verdict, that the defendants have, since the Act of 7 & 8 Vic., c. 85, obtained from Parliament new powers, and have been authorised to do acts unauthorised by the provisions of any previous Act.

The 12th section of the 7 & 8 Vic., c. 85, recites that :—“ By an E. T. 1864.  
 “ Act passed in the sixth year of the reign of her Majesty . . . . Exchequer.  
 “ it was, among other things, enacted that whenever it shall be ATTORNEY-  
 “ *necessary to move any of the officers or soldiers* of her Majesty’s GENERAL  
 “ forces of the line, ordnance corps, marines, militia, or the police v.  
 “ force, by any Railway, the directors thereof shall, and are hereby G. S. AND W.  
 “ required to, permit *such forces* respectively, *with their baggage,* RAILWAY.  
 “ horses, arms, ammunition, *and other necessities and things,* to be  
 “ conveyed at the usual hours of starting, at such prices and upon  
 “ such conditions as may, from to time, be contracted for between  
 “ the Secretary-at-War and such Railway Companies for the con-  
 “ veyance of *such forces*, on the production of a route or order for  
 “ their conveyance, signed by the proper authorities.” It then  
 enacts that :—“ It is expedient to *amend* such provision in *regard*  
 “ *to the prices and* conditions of conveyance by any new Railway  
 “ or any Railway obtaining new powers from Parliament.” And  
 “ then enacts :—“ That all Railway Companies which have been  
 “ or shall be incorporated by any Act of the present or any future  
 “ session, or which, by any Act of the present or any future session,  
 “ shall have obtained, or shall obtain, any extension or amendment  
 “ of the powers conferred by their previous Acts, or any of them,  
 “ or have been or shall be authorised to do any acts unauthorised  
 “ by the provisions of such previous Acts, shall be bound to provide  
 “ *such conveyance as aforesaid,* for the said military, marine and  
 “ police *forces*, at fares not exceeding two-pence per mile for each  
 “ commissioned officer proceeding on duty . . . . and not exceeding  
 “ one penny per mile for each soldier, marine, or private of the militia  
 “ or police force, and also for each wife, widow, or child above twelve  
 “ years of age of a soldier, entitled by Act of Parliament or by  
 “ competent authority, to be sent to their destination, at the public  
 “ expense ; children under three years of age, so entitled, being taken  
 “ free of charge, and children of three years of age or upwards,  
 “ and under twelve years of age, so entitled, being taken at half  
 “ the price of an adult . . . . . provided that every officer con-  
 “ veyed shall be entitled to take with him one hundred weight of  
 “ personal luggage, without extra charge, and every soldier, marine,

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"private, wife or widow, shall be entitled to take with him or her  
 "half a-hundred weight of personal luggage, without extra charge;  
 "all excess of the above weight of personal luggage being paid for  
 "at the rate of not more than one-halfpenny per pound, *and all*  
 "*public baggage*, stores, arms, ammunition, and other necessities  
 "and things (except gunpowder and other combustible materials  
 ". . . .), shall be conveyed at charges not exceeding two-pence per  
 "ton per mile . . . the assistance of the military and other forces  
 "being given in loading and unloading such goods."

It is contended, on the part of the Attorney-General, that, by this section, the defendants were bound, in the cases stated, to carry the whole public baggage of the 1st battalion of the 11th foot, and the whole stores and public baggage of the 8th brigade of the regiment of artillery, at the rate of two-pence per ton per mile; though in each case the greater part of the battalion and brigade respectively was not sent by the Railway.

It is, on the other hand, contended, by the defendants, that they were only bound to carry at that rate the public baggage of the particular party of the respective forces travelling in each case by the Railway, and not of the whole battalion or brigade to which it belonged; the residue of such battalion or brigade not having travelled by the Railway, or having been paid for as passengers at all.

The 12th section of the 7 & 8 *Vic.*, c. 85, has for its expressed object the amendment of the 20th section of the 5 & 6 *Vic.*, c. 55, in regard to the prices and conditions of the conveyance, which were rendered obligatory by the last-mentioned section. It fully sets out the provisions of the section of the previous Act, which created this obligation, but which left the prices and conditions of conveyance to be regulated by contract between the Secretary-at-War and the Railway Companies.

The occasions on which it was enacted that the obligation should arise was "Whenever it shall be necessary to *move any of the officers and soldiers* of her Majesty's forces of the line, ordnance corps, "marines, militia, or the police force, *by any Railway*;" and unless such occasion shall arise, no obligation is imposed on a Railway Company.

When such occasion shall arise, the obligation is "to permit *such forces* respectively, *with their* baggage, stores, arms, ammunition, and other necessities and things, to be conveyed, at the usual hours of starting, at such prices and upon such conditions as may from time to time be contracted for between the Secretary-at-War and such Railway Companies, *for the conveyance of such forces ;*" which of course must mean their conveyance *with their* baggage, stores, necessities, &c.

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The 12th section of the 7 & 8 Vic., c. 85, reduces the prices and conditions to certainty; but it does not, that I can see, make any material alterations in the occasions on which the obligation arises, or the subject of conveyance under that obligation; on the contrary, the obligation stated in the 12th section is "to provide *such conveyance, as aforesaid*" (referring to the words of the previous Act) "for the said military, marine, and police forces."

The real question therefore appears to be, whether the baggage, for which payment was demanded and made in the cases before us, at a rate exceeding two-pence per ton per mile, was "the public baggage" of those portions of the respective military forces which were conveyed by the Railway on those occasions?

The position of the defendants is, that it was not; because it in fact was and is found, by the special verdict, to have been the baggage of the whole battalion, in one case, and a whole brigade, in another; it being also found that the whole battalion and whole brigade were not conveyed by the Railway.

There is however no finding that the public baggage in question was not the baggage of the particular parties moved by the Railway; and the argument on the part of the Company seems to require that, in the construction of the Act, by the word "*their*," as applied to "public baggage" of a military force, we are to understand what is peculiarly appropriated and set apart to their use, for the benefit of the public.

It seems to me that this must be the argument: for the baggage, being "public," any notion of property on the part of the respective forces is excluded. I am unable to acquiesce in this view of the case.



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In many cases, it may well be that the only necessity of moving a party of troops is, that they may guard and see to the conveyance of military stores to some distant military force ; and if the stores are not moved with them, there is no necessity of moving them at all : and I cannot but think that the stores, so moved with them, would be their baggage—public baggage—within the meaning of the Act. It seems to me that when public baggage, of the nature contemplated by the Act, is placed in the charge of any party of men belonging to the military and other forces mentioned, for conveyance, then, whether it be or be not designed for the use of that particular party or not, it is *their* public baggage ; they cannot, consistently with their duty, move without it ; and where there is an obligation to move them with their baggage, it seems to me that this baggage must be moved with them ; it seems to me to be “ theirs,” in the only sense in which what is public can be theirs,—as having the present custody of it, whether designed for their use or not.

I have felt some difficulty as to whether the facts, sufficient to warrant my judgment, appear on the face of the special verdict : on the whole, however, I incline to think it does sufficiently appear that the parties moved by the Railway of the defendants, in the cases before us, had charge of the baggage in question, for the purpose of conveyance, and that therefore it was their public baggage, within the meaning of the Act of Parliament ; and I think therefore that the verdict ought to be entered for the Attorney-General.

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*Eschequer.*

## FOX v. BRODERICK.\*

April 16, 18.

THIS was an action for libel. The first count of the summons and plaint charged—"That whereas the plaintiff, before, &c. &c., was, "and now is, a shop-assistant, and hath always exercised, and still "exercises, the trade and calling of a shop-assistant; and whereas "the said plaintiff, before, &c. &c., was employed in a position of "trust and confidence, as shop-assistant with one Edward Keevil, "yet the defendant, well knowing the premises, but continuing and "maliciously intending to injure the plaintiff in his good name and "reputation, and to cause it to be suspected and believed that he "the said plaintiff was guilty of embezzlement, misconduct, and "dishonesty in his said trade and calling, falsely, wickedly, and "maliciously did compose and publish, and procure to be com- "posed and published, and did deliver and publish to the said "Edward Keevil, of and concerning the plaintiff, and of and con- "cerning him in relation to his trade and calling, a certain false and "malicious libel, in the words and figures following, that is to say— "‘Mr. Fox’ (meaning the plaintiff), ‘your letter to Mr. Carroll "has been handed me’ (meaning the defendant), ‘regarding a "‘small balance against Mr. L. M’Dermott, which debt you con- "‘tracted with Mr. L. M’Dermott’ (meaning the said Luke "M’Dermott) ‘while in my employment, and which still appears "‘to me to be due me. May I request the amount, in stamps, "‘before Saturday next—4s. 10d.; if not, I will hand it over for "‘collection. Mr. Carroll has no recollection whatever of it being "‘paid; he distinctly denies your telling him it was paid at any "‘time.—Yours, MICHAEL BRODERICK’ (the defendant). ‘Mr. "Carroll will prove this on oath.’—Meaning thereby that the plain- "tiff, while in the employment of the defendant as shop-assistant, "had been guilty of embezzlement, and fraudulent and dishonest

In an action for libel, the defendant pleaded that the letter containing the libel was intended to come into the hands of the plaintiff himself, but, by mistake, was directed by the defendant, and delivered through the Post-office to the plaintiff's employer, instead of to the plaintiff.

*Held*, on demurrer, that the above plea was bad, as the letter was not a privileged communication; and as the legal inference of malice would have arisen, even though the letter had been addressed and delivered to the plaintiff; and that the absence of intention to give the plaintiff a remedy by civil action for the malicious act (to which the plea amounted) was no defence.

\* *Coram* FITZGERALD and HUGHES, BB.

E. T. 1864. "conduct; and had not paid to the defendant, or placed in his till,  
Eschequer. "as was the duty of the plaintiff, the said balance of 4s. 10d.,  
 FOX "received by the plaintiff as the produce of goods sold for and on  
 v. "behalf of the defendant, but that the plaintiff had applied the  
 BRODERICK. "same to his own use; to the plaintiff's damage of £300."

The second count was the same as the first, with the innuendoes varied.

The third count alleged that the defendant's letter charged the plaintiff with misrepresentation, in writing to Mr. Carroll that the debt had been received, and placed in the till of the defendant.

The defendant pleaded, first, no libel; secondly, a traverse of the defamatory sense of the words of the letter; thirdly, a traverse of the publication of the alleged libel. The fourth defence averred that it was the duty of the plaintiff, while in the defendant's employment, to inform the bookkeeper of the latter of the payment of any debt due to the defendant; and that the bookkeeper had denied having received any information from the plaintiff relative to the discharge of the debt in question, and would depose on oath to that effect; and then ran as follows:—"And the defendant, *bona fide* believing "that the statements and charges and imputations made in and by "said supposed libel, in each of said paragraphs respectively mentioned, were respectively true in fact, he (the defendant) accordingly, to wit, at the said times when, and so forth, as in each of "said paragraphs respectively mentioned, composed and published "the said supposed libel, in the words and figures as in each of said "paragraphs respectively stated. And defendant says that said "publication was in the form of a letter, written by defendant, and "intended by him to be transmitted by post to the plaintiff only; "and that he (the defendant) wrote said letter, so intending same to "be read by plaintiff himself, and not otherwise; and same was so "written by defendant honestly and *bona fide*, and for the sole "purpose of enforcing a settlement or explanation of said transaction from plaintiff, and under the *bona fide* belief that plaintiff "had, in reference to the said money so paid to him, so acted as "aforesaid, and as so imputed to him by defendant by said supposed "libels respectively in each of said paragraphs set forth. And

"defendant, at the time he so wrote and published said letter, *bona* E. T. 1864.  
 "*fide* and honestly believed the statements and charges therein and *Exchequer.*  
 "thereby imputed to plaintiff to be respectively true in substance; FOX  
 "and same was so written and published by defendant honestly and v.  
 "*bona fide*, and without malice; and defendant avers and says that, BRODERICK.  
 "immediately upon so writing said letter, so intended by defendant  
 "solely for plaintiff, and to be transmitted by post to plaintiff, he  
 "(the defendant) inclosed said letter in an envelope, which was  
 "secured, sealed, or otherwise fastened or secured, so that no person,  
 "without forcing open such envelope, could read said letter so  
 "inclosed therein. And defendant further avers that, after having  
 "so inclosed said letter in said envelope, he (the defendant) unwittingly, and by a pure and honest oversight and mistake on his part,  
 "and not otherwise, instead of directing said envelope, so containing  
 "said letter, to the plaintiff himself, and inserting the name of Mr.  
 "Keevil and his address thereon, solely and as for plaintiff's address  
 "only, and as the place where said letter was to be delivered by the  
 "Post-office authorities, he (the defendant) accidentally, and by pure  
 "oversight and mistake, omitted to write plaintiff's name on the  
 "said envelope, as being the person for whom said letter was so  
 "intended by defendant. And the defendant, instead thereof,  
 "merely directed said letter to said Mr. Keevil, No. 27 Merchant's-  
 "quay, Dublin; and thereupon he (the defendant) posted said letter  
 "so erroneously addressed as aforesaid. And defendant says that  
 "the error so committed by defendant, in the superscription or address on the envelope so written by defendant, was an honest and  
 "*bona fide* mistake or oversight of defendant, and not made or  
 "occasioned designedly or by reason of any indirect motive or  
 "design, or wilful neglect or default of said defendant's. And  
 "defendant says that the publication of said supposed libel, in  
 "each of said paragraphs of the plaint respectively mentioned, was  
 "the delivery by the Post-office authorities of said letter, intended  
 "by defendant solely for plaintiff, but so erroneously addressed as  
 "aforesaid, at his (the said Edward Keevil's) said establishment,  
 "at No. 27 Merchant's-quay, Dublin; and which letter, by reason  
 "of said erroneous address thereon, was received and opened by the

E. T. 1864. "said Edward Keevil, or by some one acting for him in his said  
Exchequer.  
 FOX "establishment, and duly authorised by said Edward Keevil to open  
 v. "his letters, before same reached the plaintiff; and which is the  
 BRODERICK. "alleged publication in each of said paragraphs respectively com-  
 "plained of. And defendant says that the said mistake, so  
 "committed by him in the address on said letter, was not discovered  
 "by plaintiff until after said letter had been so delivered and  
 "published as aforesaid; and that, in so writing and publishing  
 "said alleged libel, he (the defendant) acted honestly, *bona fide*,  
 "and without malice towards the plaintiff."

Demurrer to the fourth defence.

*M'Dermott*, in support of the demurrer, cited *Tempest v. Chambers* (a); *Haire v. Wilson* (b); *Pierce v. Ellis* (c); *Bromage v. Prosser* (d); *Hankinson v. Bilby* (e); *Mercer v. Sparks* (f).

*Coates* (with whom was *W. J. Sidney*), in support of the pleading, cited 1 *Starkie on Slander*, p. 210; *Bromage v. Prosser* (g); *Harrison v. Bush* (h); *Smith v. Wood* (i); *Rex v. Lord Abingdon* (k); *Rex v. Paine* (l).

*M'Dermott*, in reply.

FITZGERALD, B.

April 18. This is an action of libel, brought by the plaintiff, who, at the time when the libel is alleged to have been published, was a shop-assistant to one Keevil, and who had theretofore been a shop-assistant to the defendant.

The libel in substance charges that the plaintiff, while in the defendant's employment, received money due to the defendant by a

(a) 1 Stark. 67.

(c) 6 Ir. Com. Law Rep. 55.

(e) 16 M. & W. 442.

(g) 4 B. & C. 253.

(i) 3 Camp. 323.

(b) 9 B. & C. 643.

(d) 4 B. & C. 247-257.

(f) Owen, 51.

(h) 5 Ell. & B. 344.

(k) 1 Rep. 323.

(l) 5 Mod. 163.

customer, and fraudulently failed to account for it, and converted it to his own use. E. T. 1864.  
*Exchequer.*

A defence pleaded to the action, states certain facts by which the defendant was induced to believe, and did believe, the truth of the charge. It avers that the publication complained of was in the form of a letter, written by the defendant, and intended by the defendant to be transmitted through the post to the plaintiff only, and to be read by him only. That the letter was written *bona fide* for the sole purpose of enforcing a settlement or explanation from the plaintiff. That it was published on the honest and *bona fide* belief of the truth of the charge, and without malice. That the letter when written was inclosed in an envelope securely sealed, and so that it could not be read without forcing open the envelope. That the defendant unwittingly, and by honest oversight and mistake, and not otherwise, instead of directing the letter to the plaintiff at Keevil's address, directed it to Keevil at such address, and so posted it. That the error so committed was an honest and *bona fide* mistake or oversight of the defendant, and was not made nor occasioned designedly, or from or by reason of any indirect motive or design, or wilful neglect or default of the defendants. That the publication complained of was the delivery, through the Post-office, to Keevil of the letter intended for the plaintiff solely, but so erroneously addressed to Keevil, by whom it was opened.

There is then an averment, that the mistake committed by the defendant was not discovered by him till after the letter had been so delivered and published.

To this defence there is a demurrer, and the question for our consideration is, whether the pleading can be sustained.

It is admitted that no precedent is to be found of such a plea; but, in support of it, it is contended that it is a special plea negating malice, and properly so specially pleaded, in conformity with the decisions in this country, which require pleas of privileged communication, which are also pleas negating malice, to be specially pleaded; and it is also said (which however comes very much to the same thing) that it is an argumentative traverse of any such

E. T. 1864. publication as would sustain the action; which must, I presume, mean a malicious publication.

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The only malice necessary to sustain an action of libel is a legal inference from the defamatory nature of the writing, and its publication; but such inference may be rebutted, as, for example, by showing that the occasion justified or excused the publication; and, for my part, I agree with the Counsel for the defendant, that the publication, in order to warrant such inference, must be voluntary and intentional.

Then the argument for the pleading is, that it shows the publication, to any one but the plaintiff himself, was not voluntary or intentional; and that publication to the plaintiff alone, which was the only thing intended, would not sustain the action.

In support of the pleadings, the case of *The King v. Paine* (a) was cited, in which the delivery of a defamatory paper by the writer, to an individual, in mistake for another paper, is said to have been held not to be a publication.

A decision of Lord Campbell, in the case of *Harrison v. Bush* (b), was also referred to, on which that learned Judge declines to express any opinion whether or not an action could be sustained, if one, asked by letter for the character of a servant, should *bona fide* write an answer, stating acts of dishonesty and immorality committed by the servant, and, by mistake, address it to another person different from the inquirer, although of the same name.

I am of opinion that the defendant's pleading cannot be sustained.

The vice of the defendant's argument appears to me to consist in supposing, either that a voluntary and intentional publication of defamatory matter, to the party defamed alone, is not a publication from which malice may be inferred, because no civil action can be sustained on it, or that the publication to such party alone is a privileged communication.

The matter contained in the letter in question is admittedly defamatory; its publication to the plaintiff was admittedly intended; and with that view the defendant voluntarily and intentionally parted with the possession of the letter, and put it out of his

(a) 5 Mod. 163.

(b) 5 El. & B. 350.

own control. Had the publication taken place in the mode intended, the legal inference of malice would, in my opinion, have arisen, as in a criminal prosecution for a libel so published; and the only reason why a civil action could not be sustained is, that such malicious publication would have no tendency to injure the plaintiff's reputation. But the defendant, where his voluntary and malicious act in parting with the possession of the letter is *so* done, though by accident, as to have that tendency, cannot rely, as rebutting malice, on the absence of intention to give the plaintiff a remedy by civil action.

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Again, it is wholly a mistake to suppose that the voluntary publication of defamatory matter, to the party defamed only, is a privileged communication, though it may give no right of civil action, for it may be made the subject of criminal prosecution.

In the case of *The King v. Paine*, supposing it correctly reported, the uttering or parting with the possession of the defamatory writing was not voluntary or intentional on the part of the writer; he never intended to put it out of his own control at all.

In the case supposed by Lord Campbell, and in which he expresses no opinion, the occasion of publication would have been a privileged one; and, but for the mistake, the legal inference of malice would have been rebutted.

In the case before us, the publication intended would not have been privileged; and even, though there had been no mistake, the legal inference of malice would have arisen; and what the defendant really relies on is, the absence of intention to give the plaintiff a civil remedy for his malicious act.

In my opinion, that cannot avail him; and I think therefore that the demurrer ought to be allowed. I abstain from expressing my opinion on points of form merely.

HUGHES, B., concurred.



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Eschequer.April 18.  
May 3.

## SULLIVAN v. WATERS and another.\*

In an action under Lord Campbell's Act, by the administratrix of P. S., the summons and plaint alleged "That before, &c., &c., the defendants were in possession of a certain distillery, and lofts and stores connected therewith, and that the said P. S. deceased was employed by the defendants as a labourer, to do certain work in and about the said distillery, at night; and the plaintiff avers that, at the time aforesaid, the said P. S. deceased, as such, labourer had, whilst so employed, access, by the license of the defendants, to one of the said lofts, at night; and, by such license as aforesaid, used one of the said lofts for the purpose of sleeping, during the intervals of the night when he was not actually engaged in his said employment; yet the defendants, well knowing the premises, wrongfully and negligently permitted a certain aperture, then in the floor of the said loft, to remain open without being properly guarded and lighted, by reason whereof the said P. S., whilst passing in the night along the floor of the said loft, in pursuance of the said license, fell through the said aperture, and was thereby wounded and injured; and by reason of the wounds and injuries thereby occasioned to him as aforesaid, the said P. S., afterwards, within twelve calendar months, died."

THIS was an action under Lord Campbell's Act. The summons and plaint stated that Bridget Sullivan, the administratrix of Patrick Sullivan deceased, complained "That before and at the time of the committing of the grievances hereinafter mentioned, the defendants were in possession of a certain distillery, and lofts and stores connected therewith, and that the said Patrick Sullivan deceased was employed by the defendants as a labourer, to do certain work in and about the said distillery, at night; and the plaintiff avers that, at the time aforesaid, the said Patrick Sullivan deceased, as such labourer, had, whilst so employed, access, by the license of the defendants, to one of the said lofts, at night; and by such license as aforesaid used one of the said lofts for the purpose of sleeping, during the intervals of the night when he was not actually engaged in his said employment; yet the defendants, well knowing the premises, wrongfully and negligently permitted a certain aperture, then being in the floor of the said loft, to remain open, without being properly guarded and lighted; by reason whereof the said Patrick Sullivan, whilst passing in the night along the floor of the said loft, in pursuance of the said license, fell through the said aperture, and was thereby wounded and injured; and by reason of the wounds and injuries thereby occasioned to him as aforesaid, the said Patrick Sullivan

*Held* on demurrer, that the summons and plaint disclosed neither a contract nor a duty binding on the defendants to guard or light the aperture in question.

A mere license, given by the owner, to enter and use premises, for which the licensee has full opportunity, which contain no concealed cause of mischief, and in which any existing source of danger is apparent, throws no obligation upon the owner to guard the licensee against danger.

\* *Coram* PIGOT, C. B., FITZGERALD and HUGHES, BB.

"afterwards, and within twelve calendar months before this suit, E. T. 1864.  
 "died," &c., &c. Exchequer.

Demurrer to the above, as not showing that the defendants were aware of the existence of the aperture, or that the deceased was ignorant of its existence; that it contained no averment that the defendants had been guilty of personal or superadded negligence, other than that of not guarding or lighting the aperture; and that the facts stated in the summons and plaint did not show that it was the duty of the defendants to guard or light the aperture.

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*George Waters and John O'Hagan*, in support of the demurrer.

The summons and plaint is ambiguous. The deceased may, according to it, be treated either as the servant of the defendants, or as a mere licensee. If the relationship of master and servant be supposed to have existed between the defendants and the deceased, the following principles result from the cases:—First—that the summons and plaint must aver the knowledge, by the defendants, of the defect in the premises where the plaintiff was employed. Secondly—that if the plaintiff and defendants were equally aware of the defect, the defendant is not liable. Thirdly—it must appear that the injured person was not guilty of rashness. Fourthly—that the facts which constitute the duty of the defendants, for a breach of which the plaintiff sues, must be averred by the plaintiff: *Bullen and Leake's Prec. in Pleading*, 1st ed., p. 314; *Priestley v. Fowler* (a); *Millar v. Shaw* (b); *Holmes v. Clarke* (c); *Potts v. Plunkett* (d); *Williams v. Clough* (e); *Seymour v. Maddox* (f).

As to the contract between a master and servant: *Riley v. Baxendale* (g). The deceased met with his death through his own rashness; therefore the defendants are not liable: *Wilkinson v. Fairrie* (h).

(a) 3 M. & W. 1

(c) 31 Law Jour., Exch., 356.

(e) 3 H. & N. 258.

(g) 30 Law Jour., Exch., 87.  
 VOL. 14.

(b) 1 Best & Sm. 437.

(d) 9 Ir. Com. Law Rep. 290.

(f) 16 Q. B. 326.

(h) 1 Hurl. & Colt. 633.

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 SULLIVAN defendants,—the liability of the persons giving a license depends  
 v. solely upon their knowledge or ignorance of the defect from which  
 WATERS. the licensee is injured : *Southcote v. Stanley* (a).

*H. P. Jellett* and Serjeant *Sullivan*, contra.

“Negligently” implies notice of defect or danger : *The Submarine Telegraph Co. v. Dixon* (b). It has never been laid down that a plaintiff must negative every possible defence. The true object of pleading is stated by Lord Denman, in *Williams v. Wilcox* (c), to be “Not the disclosure of the case of a party, “but the informing the Court, the jury and the opponent, of “the specific proposition for which he contends.”

Negligence depends entirely upon the relationship in which the [parties stand to each other; and what that relationship is, in the case of a master and his servant, appears from *Patterson v. Wallace* (d) and *Ashworth v. Stanwix* (e). Where the master knows of any defect, or ought to know of it, he is as liable to the servant as any other member of the community would be. *Priestley v. Fowler* (f) was decided before the passing of the Common Law Procedure Act. The averment of negligence under the latter statute charges personal negligence, whether the relationship of master and servant exist or not.—[FITZGERALD, B. What is personal negligence?—It is very hard to define it, save by excluding a number of cases. It may be said to arise where no fellow-servant interferes, or where a master is guilty of omitting or committing any act which he ought either to have done, or not to have done.

In *Seymour v. Maddox* (g) there was no averment of negligence, nor had the distinction of personal negligence been then taken by the Courts. *Holmes v. Clarke* (h) did not turn on the pleadings; and *Riley v. Baxendale* (i) amounts to this, that a duty cannot be

(a) 1 Hurl. & Nor. 247.

(c) 8 Ad. & Ell. 392.

(e) 30 L. J., Q. B., 183.

(g) 16 Q. B. 326.

(b) 3 New Rep. 572.

(d) 1 Macq. H. of L. Cas. 751.

(f) 3 M. & W. 1.

(h) 31 L. J., Exch., 356.

(i) 30 L. J., Exch., 87.

charged as an element of contract. This case is governed by *Corby v. Hill* (a), in which *Southcote v. Stanley* (b) is shown to stand upon the relation of host and guest. The plaintiff here does not rely upon the existence of the relationship of master and servant between the deceased and the defendants; and this is the very case put by Miller, J., in *Corby v. Hill*, "One who comes upon another's land, by the owner's permission or invitation, has a right to expect that the owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons lawfully coming there may receive injuries."

Personal negligence is averred in the summons and plaint, and the defendants, as the masters of the deceased, are not exempted. And, assuming knowledge of the defect in the loft brought home to the defendants, and of the deceased using the loft in the intervals of his business, it was the duty of the defendants to keep the aperture in the loft properly fenced.

*Hounsell v. Smith* (c); *Bolch v. Smith* (d); *Gallagher v. Humphrey* (e); *Metcalfe v. Hetherington* (f); *Robins v. Jones* (g), were also cited.

*J. O'Hagan*, in reply.

*Cur. ad. vult.*

The LORD CHIEF BARON now delivered the judgment of the Court. May 3.

This was a demurrer to a summons and plaint, brought by the widow and administratrix of Patrick Sullivan, claiming damages from the defendants, under Lord Campbell's Act, on the ground that the death of Patrick Sullivan was occasioned by the negligence of the defendants. The negligence relied on is stated to consist in their permitting an aperture in a loft of the defendants to remain unguarded and neglected, by reason of which the deceased, passing

(a) 4 C. B., N. S., 556.

(b) 1 Hurl. & N. 247.

(c) 7 C. B., N. S., 731.

(d) 31 L. J., Exch., 201.

(e) 6 Law T. 684.

(f) 11 Exch. 257.

(g) 33 L. J., C. P., 1.

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It is well settled by numerous authorities, several of which (including *Seymour v. Maddox*)(a), are collected in the judgment of Baron Parke, in *Metcalf v. Hetherington* (b), that the facts from which a duty is alleged, by a plaintiff suing for a breach of it, to arise, must be set forth in his pleading. This rule was applied in the decision in *Metcalf v. Hetherington*; and it was there laid down, that the words "negligently and improperly," "and contrary to their duty," will not dispense with the necessity of setting forth the facts which show the duty. A similar decision was made in *The General Steam Navigation Company v. Morrison* (c), in which negligence and carelessness were expressly averred. And the same rule was applied by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, in the recent case of *Dutton v. Powles* (d). The action in that case was brought by the owners of a ship, against the charterer of their vessel, for not delivering to the plaintiffs, copies, which had been given to the captain, of eight bills of lading relating to a cargo of goods shipped on board the vessel for a foreign port; such copies being necessary for the purpose of making out a complete and accurate consular manifest in respect of the goods mentioned in the bills of lading. The Court held that the facts, which were set forth in considerable detail in the declaration, did not show the existence of any contract or duty of the defendant to deliver to the plaintiffs the documents in question. Lord Chief Justice Erle, in delivering judgment, in the Court of Exchequer Chamber, after showing that "no circumstances were alleged to which a known duty was attached by "law," referred to the *allegations* of duty and of negligences which were contained in the declaration, and said—"But, inasmuch as here "there was no contract, and there were no circumstances from "which the duty can be inferred, the allegation of duty, and of "a breach of duty, does not show a cause of action, merely because

(a) 16 Q. B. 226; S. C., 19 L. J., Q. B. 525.

(b) 11 Exch. 257.

(c) 13 Com. B. 581.

(d) 2 Best & Smith, 174, 191.

"it is added, that the defendant negligently, improperly, and carelessly handed over to the plaintiff's agent four out of eight bills of lading, as and for the whole, and retained the other two; that negligence does not of itself create a cause of action, unless it amounts to a breach of duty. If there was a duty in the defendant to take care to deliver up all the copies, then the negligence alleged was a breach of that duty; but, in this declaration, I can find nothing to show that there was any such duty; consequently there was no breach of duty in the defendant for which an action lies." In two of the cases which I shall cite for another purpose, *Southcote v. Stanley (a)* and *Hounsel v. Smith (b)*, negligence was expressly averred.

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In the case before us, we have therefore to consider whether the statements of the summons and plaint show a duty in the defendants to take that care, in the guarding or lighting of the aperture in question, the want of which care is the negligence charged in this pleading.

Its statements are, in substance, these :—that the defendants being, at the time of the grievances in question, in the possession of a distillery, and lofts connected with it, Patrick Sullivan was employed by them as a labourer to do certain work about the distillery, at night; that Patrick Sullivan, as such labourer, had, *whilst so employed, access by the license of the defendants* to one of said lofts, *at night*; and, by such license, used one of said lofts for the purpose of sleeping, *during the intervals of the night when he was not actually engaged in his said employment*. The summons and plaint then proceeds (in the form of an assignment of a breach) to allege, "yet the defendants, well knowing the premises, wrongfully and negligently permitted a certain aperture, then being in the floor of the said loft, to remain open, without being properly guarded and lighted; *by reason whereof* the said Patrick Sullivan, whilst passing in the night along the floor of the said loft, *in pursuance of the said license*, fell through the said aperture, and was thereby wounded and injured; and, by reason of the wounds and injuries thereby occasioned to him as aforesaid, the

(a) 1 H. &amp; N. 247.

(b) 7 C. B. 731.

E. T. 1864. "said Patrick Sullivan afterwards, and within twelve months before  
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 "this suit, died."

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I may here lay aside all reference to so much argument addressed to us, as suggested, that this pleading could be supported on the ground, that it showed an obligation in the defendants, as masters, to provide against danger, arising to Patrick Sullivan as their servant, from the leaving of this aperture unlighted and unguarded. If the use of the loft for sleeping formed part of the conditions of his employment, we should still have to consider, whether, in the allegations of the summons and plaint, enough appeared to show that he did, or that he did not, accept the risk as part of the employment; that he did, or did not, know that risk; or that the defendants were answerable for neglect, upon the ground of what has been called, in some of the cases (explaining and qualifying what was stated by the Court in *Priestly v. Fowler*)(a) "personal negligence."—See *Holmes v. Clarke* (b); *Ashworth v. Stanwix* (c); *Mellor v. Shaw* (d). The summons and plaint states explicitly, that Patrick Sullivan the deceased used the loft in question for sleeping, during the intervals of the night when he was *not* actually engaged in his said employment. The preceding statement, which describes his employment, makes no mention of the sleeping of the deceased on the loft, or the providing of a place in which the deceased should sleep, as forming any part of the contract of employment. On the contrary, the pleading states, that the deceased had access to the loft, for the purpose of sleeping, by the *license* of the defendants; which negatives that he used the loft for that purpose under the contract of his employment. It is therefore quite plain that, if any obligation towards the deceased existed in the defendants to guard or light the aperture, such obligation must have arisen from the license to use the loft at night, and from the fact that the deceased used the loft in pursuance of that license.

How far the owner of premises, who gives to another person license to enter and use them, is answerable for negligence in not

(a) 3 M. & W. 1.

(b) 6 H. & N. 349; affirmed on appeal, 7 H. & N. 937.

(c) 30 L. J., Q. B., 183.

(d) 1 Best & Smith, 437.

guarding from danger existing on the premises, the person to whom he gives such license, is not very clearly defined by the decisions which have been made on questions of this nature. A distinction seems however to have been taken between the case of a person who enters *and uses* the owner's premises by the owner's express invitation, or as a customer who, as one of the public, is induced by the owner to come to his premises for the purposes of business carried on by the owner there, on the one side; and, on the other, the case of a mere visitor or guest, invited or uninvited, or of a person who has a mere license to go upon the premises of the owner. The first class of cases comprises those of *Corby v. Hill* and *Chapman v. Rothwell*; to which may be added, *Gallagher v. Humphrey* (a). In the second we find *Southcote v. Stanley*, *Hounsel v. Smyth*, *Bolch v. Smith*, and *Wilkinson v. Fairrie*.

In the case of *Corby v. Hill* (b), the owner of land, having a private road running through it and leading to a lunatic asylum, and the residence of the superintendent of the asylum, allowed the road to be used by persons going to the asylum. The defendant, a builder, placed a quantity of slates upon the private road, and left them there at night, without placing a light or signal near them, or other means of showing where they were. The plaintiff's servant was driving, at night, the plaintiff's horse and carriage along the road to the residence of the superintendent, when, not seeing the slates, he drove against them, and the result was that the horse was seriously injured. The declaration alleged, and the jury found, that the injury was caused by the defendant's negligence, and that the plaintiff was entitled to recover. The Court held, upon a motion in arrest of judgment, that the declaration was not defective because it did not allege that the slates were not placed upon the road by the permission of the defendant; being of opinion that such an allegation was unnecessary and immaterial. Lord Chief Justice Cockburne, in his judgment, said:—"The proprietors of the soil " held out an allurements, whereby the plaintiff was induced to come " upon the place in question; they held out this road to all persons

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(a) 10 Weekly Rep. 664; S. C., 6 Law T. 684.

(b) 4 Com. B., N. S., 556.



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 WATERS. "having occasion to proceed to the asylum, as the means of access thereto. Could *they* have justified the placing an obstruction across the way, whereby an injury was occasioned to one using the way by their invitation? Certainly not." In this case, it will be observed, there was not only an invitation (as the Court held, upon the nature of the consent given to the use of the road by the public) to use the private way, but there was also an act of misfeasance in placing an obstruction on the way, which was not there before, without warning, and so as to create a new cause of danger to those travelling upon it by night.

In *Chapman v. Rothwell (a)*, the defendant was in possession of a brewery, an office, and a passage leading from them to a public street. This passage formed the ordinary means of ingress and egress between the office and the street. The declaration, after stating those facts, averred that the defendant "wrongfully and negligently permitted a trap-door in the floor of the passage to remain open, without being properly guarded and lighted;" and it then averred that the plaintiff's wife, who had been to the office as a customer of the defendant, and otherwise upon her business, while lawfully passing along the passage, on her return from the office to the street, "by reason of the said negligence and improper conduct of the defendant," fell through the trap-door, and was injured and killed. The Court, upon demurrer to the declaration, held that it was good; and that the duty of the defendant, and the breach, sufficiently appeared. The defendant's Counsel relied on *Southcote v. Stanley (b)*, which I shall presently mention. Mr. Justice Erle said:—"The distinction is, between the case of a visitor (as the plaintiff was in *Southcote v. Stanley*), who must take care of himself, and a customer who, as one of the public, is invited for the purposes of business carried on by the defendant."

It has however been held, that, where a mere license has been given by the owner to enter and pass through his premises (or, as in one case, *Southcote v. Stanley*, where the owner's invitation has been only to come to his house as a visitor), the law imposes upon

(a) 1 Ell., B. & Ell. 168.

(b) 1 H. & N. 242.

the owner no duty to take care that the licensee or visitor shall be guarded against the risks which previously existed : in other words, the licensee or visitor must take care of himself, in using the premises as he finds them ; and that he is not entitled to be protected from the existing risks of the premises, in their ordinary state, by the care of the owner.

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In *Southcote v. Stanley* (a) the declaration stated that the plaintiff, by the permission and invitation of the defendant, came to the defendant's house as a visitor ; the house being a hotel, in which there was a glass door, which door it was necessary for the plaintiff to open for the purpose of leaving the house ; that by the permission and with the knowledge of the defendant, and without any warning from him, the plaintiff, in leaving the premises, lawfully opened the door, as a door which was in a proper condition to be opened ; " that " by the mere carelessness, negligence, and default of the defendant " in that behalf, the door was then in an insecure and dangerous " condition, and unfit to be used or opened ; " and that, by reason of the door being in such condition, and by the carelessness, negligence, and improper conduct of the defendant in that behalf, a large piece of glass fell out of the door, and wounded and injured the plaintiff. To this declaration there was a demurrer ; and the Court held the declaration bad. The Lord Chief Baron Pollock, in his judgment, stated that the rule by which, according to the case of *Priestly v. Fowler*, the servant undertakes to run all ordinary risks of service " applies to all the members of a domestic establishment ; so that a " master is not, in general, liable to a servant for injury resulting " from the negligence of a fellow-servant ; nor can one servant " maintain an action against another for negligence, whilst engaged " in their common employment. The same principle applies to the " case of a visitor at a house ; whilst he remains there, he is in the " same position as any other member of the establishment, so far as " regards the negligence of the master or his servants ; and he must " take his chance with the rest." Baron Alderson was of the same opinion. Baron Bramwell expressed his opinion that " where a " person is in the house of another, either on business or for any

(a) 1 H. & N. 247.

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 WATERS. "other purpose, he has a right to expect that he will take reasonable care to protect him from injury; for instance, that he will not allow a trap-door to be open, through which the visitor may fall. But," he added, "my difficulty is to see that the declaration charges any act of commission. If a person asked another to walk into his garden, in which he had placed spring-guns or men-traps, that would be an act of commission. But if a person asked a visitor to sleep in his house, and the former omitted to see that the sheets were properly aired, whereby the visitor caught cold, he could maintain no action; for there was no act of commission, but simply an act of omission." He then proceeded to comment on the statements of the declaration; showing that the words were all negative; and apparently resting his judgment on the ground that the negligence alleged consisted in *non-feazance*, and not in *mis-feazance*.

In *Hounsel v. Smith (a)*, the declaration stated, in substance, that the defendants were the owners of waste land, uninclosed, lying between two highways; that on part of the waste land, between the two highways, there was a dangerous, precipitous, open quarry; and that all persons having occasion to pass over the waste land had been used and accustomed to do so with the license and permission of the owners; "that the defendants, well knowing the premises, negligently, improperly, and contrary to their duty in that behalf, left the said quarry wholly unfenced and unguarded," and took no care, and used no means for protecting any person accidentally deviating from the road, or passing over the waste land, from falling into the quarry; that the plaintiff, having, at night, occasion to pass along one of the roads, and having accidentally taken the wrong one, was crossing the waste land for the purpose of getting into the other road, and that, not knowing the existence or locality of the quarry, and being unable, from the darkness, to perceive it, and the same being unfenced and unguarded, he, by reason thereof, and by reason of the negligence of the defendants in that behalf, fell into the quarry, and was seriously injured. The defendants demurred. The Court held the declaration

(a) 7 C. B., N. S., 731.

bad. Mr. Justice Williams, after commenting on the statements of the declaration, irrespectively of the allegation that the waste land was used, in the manner described, by the license of the defendants, and after expressing his opinion that, without that allegation, it showed no duty in the defendants, read the allegation of license, and said :—"No right is alleged; it is merely stated that the "owners allowed all persons who chose to do so, for recreation or "for business, to go upon the waste, without complaint; that they "were not churlish enough to interfere with any person who went "there. One who thus uses the waste, has no right to complain "of an excavation he finds there. He must take the permission "with its concomitant conditions, and, it may be, perils."

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In *Bolch v. Smith* (a), the workmen in a Government dockyard were permitted, by the possessors of the ground, to use certain paths across the dockyard. Across one of these paths the defendant had placed a revolving shaft, extending, above six inches above the ground, from machinery at one side of the path to a mortar-mill on the other. The shaft was unfenced. The plaintiff, one of the workmen, in walking on the path, accidentally stumbled, and was severely injured by the revolving shaft. It was determined that there was no obligation on the defendant to fence the shaft. Baron Chanuel considered the case as falling "within the law, as explained in *Hounsel v. Smith*." Baron Byles stated that he "did not mean "to say that if the defendant made a hole in the yard, and had "covered it in a way that was insufficient, but which appeared "sufficient, he would not be liable; but here there was nothing of "that character; the danger was open and visible; there was "nothing which could be called a 'a trap.'"

In *Wilkinson v. Fairrie* (b), the plaintiff, a carman, was sent by his employer to the warehouse of the defendants, who were sugar-refiners, to fetch a tierce of sugar. After waiting some time, he was directed, by the servant of the defendants, to go along a passage, to a counting-house, where he would find the warehouseman. The passage was dark; and, in going along it, he fell down a staircase, and was seriously injured. The learned Judge, at the trial,

(a) 7 H. & N. 737.

(b) 1 H. & C. 633.

E. T. 1864. nonsuited the plaintiff; being of opinion that, if he could see his way, the accident was the result of his own negligence; and if he could not see his way, he ought not to have proceeded without a light. The Court upheld the nonsuit, refusing a conditional order for setting it aside; holding that there was no obligation on the defendants to light the passage or to fence the staircase. Lord Chief Baron Pollock closed his judgment by saying:—"As there was no contract, or any public or private duty on the part of the defendants that these premises should be in a different condition from that in which they were, it seems to us that the nonsuit was perfectly right."

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It is not easy to reconcile all these decisions, and the language of the Judges in some of the reports of them, by referring the decisions themselves to clear and fixed principles. The law does not seem to be well defined which distinguishes the case of the customer going between the defendant's office and the street, in *Chapman v. Rothwell* (a), from that of the carman of a customer, in *Wilkinson v. Fairrie* (b), repairing to the warehouse of the defendants, in the ordinary course of business, for the purpose of bringing, from their warehouse to his master, goods in which the defendant dealt. The distinction between negligence in commission and negligence in omission, mentioned in one of the cases which I have cited (c) (and in another, *Gallagher v. Humphrey*, which I shall presently mention), cannot be relied on as furnishing in itself the ground of any general rule applicable to this subject. In truth it is, in reference to many transactions and occurrences in which a violation of duty is the foundation of complaint, a distinction rather verbal than real.

When an owner of land makes a dangerous excavation which he does not fence, close to and abutting upon a highway, he is liable for injury caused by it to a passenger who falls into it without any default of his own: *Barnes v. Ward* (d). This is an act of commission. But if afterwards he, or the succeeding owner, leaves the excavation unfenced, he is liable to the party similarly injured. This is a default consisting in omission. So it was in the cases

(a) 1 E., B. & E. 168.

(b) 1 H. & C. 633.

(c) 1 H. & N. 250.

(d) 9 Com. B. 392.

in which the owners or occupiers of unfenced areas were held liable E. T. 1864.  
 in *Copland v. Hardingham* (a) and *Jarvis v. Dean* (b). And so Exchequer.  
 it is in reference to many continuing nuisances, as well public as SULLIVAN  
 private. In the former the defaulters are liable to indictment; in v.  
 both they are liable for damages to the parties individually injured. WATERS.  
 In every such case the default of the defendant may be described as  
 consisting in the mere *omission* to do such act (for example, to fence  
 an excavation or a trap-door) as may be necessary to prevent mis-  
 chief. Or it may be described as the *commission* of misconduct  
 in *keeping* and *continuing* the nuisance or matter which is calculated  
 to cause mischief, or in keeping and continuing it with negligence,  
 consisting in omitting to supply the necessary safeguards against  
 mischief; for example, to fence the excavation or the trap-door.  
 In all such cases, whether of omission or commission, there is one  
 common element, viz., the violation of a duty; and the safer rule  
 would be, that where the duty exists, whether to do an act or to re-  
 frain from it, the violation of the duty, where individual injury is the  
 result of negligence in the non-observance of the duty, creates the  
 liability to the party injured. An impression seems at one time  
 to have existed that manslaughter could not be committed by the  
 negligent *omission* to perform a duty, the non-performance of which  
 was the cause of death: *Rex v. Allen* (c); *Rex v. Green* (d). This  
 was corrected by the Court of Criminal Appeal, in a unanimous and  
 considered judgment, in 1 *Dearsly and Bell's Crown Cases*, p. 248.  
 It was there laid down by Lord Campbell, in delivering the judg-  
 ment of the Court, as settled law, that—"If death is the direct  
 "consequence of the malicious omission of the performance of a  
 "duty (as of a mother to nourish her infant child), this is a case  
 "of murder. If the omission was not malicious, and arose from  
 "neglect only, it is a case of manslaughter."

Cases certainly occur, in which the distinction illustrates the  
 existence or absence of liability. One of these gave rise to the  
 decision in *Gallagher v. Humphrey* (e). There the plaintiff, a

(a) 3 Camp. 398.

(b) 3 Bing. 447.

(c) 7 Car. &amp; P. 153.

(d) 7 Car. &amp; P. 156.

(e) As reported in 10 Weekly Reports, 664; S. C., 6 Law Times, 684.

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passenger who, with the rest of the public, had license from the owners of the ground over which a passage was situated, to go and come along the passage, was injured by the breaking of a chain belonging to a crane which the defendant had in the passage. The chain, in conveying weights, broke by reason of the negligence of the defendant's servants; and the plaintiff, who was thereby injured, was held entitled to maintain an action for the injury. All the Judges held that, although the existence of the crane, in the ordinary use of it, had been a cause of danger, there would have been no duty in the defendant to guard against such danger. "The grantee," says Lord Chief Justice Cockburn, "must use the permission as the thing exists." But although the omission to guard against a danger existing when the license was granted, subject to which the license was given, and against which therefore there was no duty in the grantor to guard, was no breach of any duty, and therefore gave no cause of action, yet, when a new danger was *superadded by an act of negligence* on the part of the defendant or of his servants (for whose acts he was responsible), the case was altered, and the defendant was liable. "The defendant," in the language of the Lord Chief Justice, "places himself by such permission under the obligation of *not doing* anything, by himself "or his servants, from which injury may arise." And Mr. Justice Blackburne considered their judgment as in accordance with what was held by the Court of Exchequer in *Bolch v. Smith (a)*, and by the Court of Common Pleas in *Hounsel v. Smith (b)*.

I have referred in detail to so many of the cases decided within the last few years, for the purpose of explaining why I do not attempt to rest my judgment, in the case now before us, upon any general rule or test distinguishing where the owner of premises, which he licenses another to use, shall, and where he shall not, incur the obligation to guard the licensee against danger. From the authorities, in their present state, I am unable to extract such general text or rule. That the owner *may* incur such obligation is shown by some of the decisions; that in many cases he will not is shown by others. This however may, I think, be safely laid

(a) 7 H. & N. 737.

(b) 7 C. B., N. S., 731.

down as established by the second class of decisions to which I have referred, that a mere license, given by the owner, to enter and use premises which the licensee has full opportunity of inspecting, which contain no concealed cause of mischief, and in which any existing source of danger is apparent, creates no such obligation in the owner. Such is the case presented by this summons and plaint. Patrick Sullivan, the deceased, had a mere license to use the loft for the purpose of sleeping there. Nothing more is said of the nature of the aperture than that some aperture existed. The aperture not being stated to have been concealed, we cannot presume that it was other than open and apparent. The defendants are stated to have permitted the aperture to *remain* open. The deceased is stated to have *used* the loft for sleeping. The statement therefore negatives the fact of the aperture having been for the first time open when the deceased fell through it, and shows that he had previous means of knowing its existence. In this view the case appears to me not to be distinguishable from *Hounsel v. Smith* (a); *Bolch v. Smith* (b), and *Wilkinson v. Fairrie* (c). The deceased took the accommodation of permission to sleep on the loft, instead of remaining up at night, or sleeping elsewhere during the intervals in which he was not actually engaged in the business of the defendants. He must I think be considered as having taken the permission (to apply the language of Mr. Justice Williams in *Hounsel v. Smith*), "with its concomitant conditions and, it may be, perils." Under such circumstances he was his own insurer.

The declaration, not showing either a contract or a duty binding the defendants to guard or light the aperture, I am of opinion that the declaration is bad, and that the defendants are entitled to judgment on this demurrer.

The case was well argued. I must say that the assistance which we derived from the full review of the authorities given to us by Mr. *Waters* in his opening argument, was enhanced by the circumstance that he brought before us the authorities at both sides; a course which often serves, and, in result, seldom injures the client whose Counsel adopts it.

(a) 7 C. B., N. S., 731.

(c) 1 H. & C. 633.

(b) 7 H. & N. 737.

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Common Pleas

**SWEENY v. THE TRUSTEES OF THE PROMOTER  
LIFE ASSURANCE AND ANNUITY COMPANY.\***

(*Common Pleas*).

Nov. 4.

The summons and **plaint** **DEMURRER.**—The first paragraph of the summons and **plaint** stated that by a policy of assurance made by the defendants as trustees of the A Life Assurance Company, reciting that the plaintiff had proposed to effect an assurance on the life of M., and had caused to be delivered, into the office of the said Company, a declaration setting forth the age, &c., of M.; and that it had been agreed that such declaration should be the basis of the contract of assurance, it was agreed that upon the death of M., the funds of the Company should, in consideration of the premiums, be liable to pay to the plaintiff the sum of £200; provided that if anything averred in the declaration should be untrue, the policy should be null and void. Averment:—That the said M. died whilst the policy was in full force and effect; and non-payment.

Defence:—That, by the declaration in the summons and **plaint** mentioned, and which was by the policy made the basis of the contract of assurance, the plaintiff undertook that the age of M. did not exceed fifty-six years; and it was thereby agreed that the said undertaking should be the basis of the contract, and that if any untrue averment should be contained therein, the policy should be null and void. Averment:—That the age of the said M., at the time of the signing of the said declaration, exceeded fifty-six years, and by reason thereof that the said policy was null and void.

Replication, on equitable grounds:—That before and at the time of the making of the said proposal and policy, the plaintiff was in communication with the defendants, upon the subject of the said proposal and policy; and that in the course of, and all through such communications, the defendants meaning and intending that the plaintiff should believe and act upon the belief, by their conduct caused the plaintiff to believe, and the plaintiff accordingly did believe, and acted upon and made such proposal, acting upon the belief that the age of the said M. did not, at the time, &c., exceed fifty-six years; and that the plaintiff did not in fact know, save than from the defendants themselves, whether the age of the said M., at the time, &c., exceeded fifty-six years or not.

*Held*, on demurrer, that this was a good equitable replication.

That it did not contradict or vary the contract under seal, declared on in the **plaint**, and therefore was not a departure.

That the matters pleaded therein amounted to an independent parol collateral contract which would have afforded grounds for an action against the defendants; and, when pleaded by way of replication, brought the case within the principle of *Pickard v. Sears*.

\* Before the Full Court.

for the whole continuance thereof; and had caused to be delivered into the office of the said Company a declaration or statement, bearing date the 19th of February 1859, signed by the said plaintiff, setting forth the age, habits, and state of life of the said Rose Helen Meredith, and other things as in the said policy mentioned; and that the plaintiff was interested in the life of the said Rose Helen Meredith to the amount of the said sum of £200; *and that it had been agreed that such declaration should be the basis of the contract* between the said plaintiff and the said Company and that the said plaintiff had paid to the said Company the sum of £10. 16s. 8d., as the premium or consideration for the assurance of the said sum of £200 on the life of the said Rose Helen Meredith, for the space of one year, commencing on the day of the date of the said policy, and terminating on the 4th day of March 1860, both inclusive. It was declared and agreed by the said policy that, if the said Rose Helen Meredith should die before the 5th day of March 1860, or if the said plaintiff, his executors, administrators or assigns, should, in the event of the said Rose Helen Meredith living beyond the said 5th day of March, pay to the said Company, during the remainder of the life of the said Rose Helen Meredith, the annual premium of £10. 16s. 8d., on or before the said 5th day of March, and on or before the 5th day of March in every subsequent year, the funds and property of the Company should be subject and liable, according to the provisions of the said Company's deed of settlement, to pay unto the said plaintiff, his executors, administrators or assigns, within three calendar months after due proof should have been received at the office of the said Company of the death of the said Rose Helen Meredith, the sum of £200. The paragraph then set out a proviso for making void the policy in certain events, which proviso concluded as follows:—"or if anything averred in the declaration or *attestation thereinbefore mentioned should be untrue*, or the referees should be proved to have knowingly given false testimonials, *the policy should be null and void, and all moneys which should have been paid on account of the said assurance should be forfeited to the said Company.*" The paragraph then

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set out certain other provisoes contained in the policy, and proceeded:—And the plaintiff says that, at the time of the making of the said policy, he was interested in the life of the said Rose Helen Meredith to the amount so assured as aforesaid; and that the said Rose Helen Meredith survived the said 5th day of March 1860; and that the plaintiff duly paid to the said Company the annual premium of £10. 16s. 8d., on or before the 5th day of March in each subsequent year, for keeping the said policy in force; and that the said policy, at the time of the death of the said Rose Helen Meredith, hereinbefore mentioned, was and continued in full force; and that whilst the said policy was in such full force and effect, and before this suit, the said Rose Helen Meredith died; and at the time of the death of the said Rose Helen Meredith, and thenceforth hitherto, the funds and property of the said Company, in the hands or power of the defendants, were and always had been sufficient, according to the provisions of the deed of settlement of the said Company, after satisfying all prior claims thereon, to pay, satisfy, and make good to the plaintiff the said sum of £200, according to the tenor and effect, and true intent and meaning of the said policy.

Averment of performance of conditions precedent, and non-payment.

Defence:—That the declaration or statement in the policy of assurance, and writ of summons and plaint respectively mentioned, *and which was, by the said policy, made the basis of the contract for assurance between the plaintiff and the said Company*, was a certain proposal in the words and figures following, that is to say;—

“(Life of Another.)

“*Promoter Life Assurance and Annuity Company.*

“I, B. Sweeney, of Tralee, in the county of Kerry, builder, being  
 “desirous of effecting an assurance with the trustees of the Pro-  
 “moter Life Assurance and Annuity Company, in the sum of £200,  
 “without profit, on the life of Rose Helen Meredith, widow, born in  
 “Tewkesbury, in England, and now residing at Dicksgrove, Castle-  
 “island, in the county of Kerry, for the whole term of life, do

*"hereby undertake that her age does not exceed fifty-six years ;* M. T. 1863.  
*"that she has had the smallpox or cowpox ; that her habits are* *Common Pleas*  
*"sober and temperate ; that she never had the gout or asthma, or* *SWEENEY*  
*"any fit or fits, or suffered a spitting of blood ; that she is not* *v.*  
*"afflicted with any complaint, affection, or disorder which tends to* *PROMOTER*  
*"shorten life ; and that I have an interest in the life of the said* *LIFE*  
*"Rose H. Meredith, to the full amount of £200 ; and I do hereby* *ASSURANCE*  
*"agree that this undertaking shall be the basis of the contract* *COMPANY.*  
*"between me and the said Company ; and that, if any untrue*  
*"avermment be contained herein, or if the referees have knowingly*  
*"given false testimonials, all moneys which shall have been paid*  
*"to the said Company, on account of the said assurance, shall be*  
*"forfeited, and that the said policy shall be null and void ;"* and I  
*"do also agree that I will abide by the provisions contained in the*  
*"deed for the settlement of the said Company, dated the 5th day*  
*"of July 1826, which relate to the privilege of voting for auditors,*  
*"and to the liabilities of the shareholders and officers of the insti-*  
*"tution ; and likewise that I will acquit from all responsibility all*  
*"the other holders of policies in the said Company.*

(Signed)

"BATT SWEENEY.

"Dated this 19th day of February 1859.

"Witness—THOMAS KENNA, Tralee."

And the defendants aver that, by the said policy in the said paragraph mentioned, it was provided that, if anything averred in the declaration therein and hereinbefore mentioned was untrue, the said policy should be null and void ; and all moneys which should have been paid on account of the said assurance should be forfeited to the said Company. And the defendants aver that all conditions have not been fulfilled, nor has everything happened or been done necessary to entitle the plaintiff to receive the said sum of £200 ; because the defendants say that the statements contained in the said declaration are not true in the particular hereinafter mentioned, that is to say, *that the age of the said Rose H. Meredith, at the time of the signing of the said declaration, exceeded fifty-six years ;* by reason whereof, and by force and effect of the terms and conditions of the said policy, all moneys paid to the said Company on account

M. T. 1863. of the said assurance have become forfeited; and the said policy  
*Common Pleas* was, and is, null and void.

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Replication:—And, as a replication to said first defence, upon equitable grounds, the plaintiff, by leave of the Court, says that the defendants ought not to be admitted or received to plead the said first defence, or to make the allegations therein contained; because the plaintiff says that before and at the time of the making of the said proposal and policy, in the summons and plaint and said first defence respectively mentioned, he was in communication with the said defendants, upon the subject of the said proposal and policy; and that in the course of, and all through such communications, the defendants, meaning and intending that the plaintiff should believe, and act upon the belief, by their conduct caused the plaintiff to believe, and the plaintiff accordingly did believe, and acted upon, and made said proposal acting upon the belief that the age of the said Rose H. Meredith did not, at the time of the making of the said proposal, exceed fifty-six years; and that the plaintiff did not in fact know, from any documents or otherwise howsoever save than from the defendants themselves, whether the age of the said Rose H. Meredith, at the time of the making of the said proposal, exceeded fifty-six years or not.

Demurrer thereto.\*

Serjeant *Sullivan*, and *Jellett*, in support of the demurrer.

*C. Barry* and *W. O'Brien*, in support of the replication.

*Jellett.*

This replication is bad, as being a departure from the declaration. The effect of it is to alter the contract originally sued on in the

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\* The following points were noted for argument:—

That the said replication is bad; inasmuch as it neither traverses, or confesses, or avoids the subject-matter of the defence to which the same is pleaded. And that the representations and statements, in the said replication mentioned, could not alter, qualify, or dispense with the terms of the policy of assurance in the writ of summons and plaint mentioned. And that the said replication amounts to the statement of a new contract between the plaintiff and the defendants, different from that stated in the writ of summons and plaint; and is a departure from the cause of action in the writ of summons and plaint stated.

summons and plaint, by expunging from it one of its most important conditions, viz., that everything stated in the declaration should be true. Again, the plaint puts the case entirely upon the contract, while the replication alters it into a case partly of contract, and partly of tort for false representation. A departure in pleading is ground of general demurrer: *Blood v. Keller* (a), *The Thames Iron Works Company v. The Royal Mail Steam-Packet Company* (b).

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In *Bullen and Leake's Precedents of Pleadings*, 2nd ed., p. 486, it is said:—"Equitable replications will not be allowed, which "are inconsistent with the legal right alleged in the declaration." *Bartlett v. Wells* (c) is a strong case of an equitable estoppel *in pais*; and in that case a replication, precisely similar to the present, was held bad, on demurrer, as being a departure. This replication is bad on another ground, namely, that it seeks to qualify a contract under seal, by cotemporaneous parol statements. No case can be found where a contract, under seal, was permitted to be varied by statements of that kind. If the parol statements be cotemporaneous, they would have the effect of nullifying the clauses of the instrument under seal which are sought to be affected by them.

He cited *Reis v. The Scottish Equitable Life Assurance Society* (d).

*W. O'Brien and C. Barry.*

This replication does not set up a qualification or modification of the original contract sued on in the summons and plaint; on the contrary, it admits that the plaintiff is bound by that contract; but the effect of the replication is this, that, by reason of certain conduct and representations on the part of the defendants, he is estopped or precluded from relying on that contract.

In *Taylor on Evidence*, 2nd ed., vol. 1, p. 670, s. 769, the rule is laid down:—"Every admission which has been made with the

(a) 13 Ir. Com. Law Rep. 124.

(b) 13 Sc., C. B., N. S., 358.

(c) 31 L. J., N. S., Q. B., 57.

(d) 2 H. & N. 19.

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 SWEENEY *v.* "another person, is conclusive against the party making it, in all  
 PROMOTER "cases between him and the individual whose conduct he has thus  
 LIFE "influenced. It is of no importance whether such admission be  
 ASSURANCE "made in express language to the person who acts upon it, or be  
 COMPANY. "implied from the general conduct of the party making it; for, in  
 "the latter case, the implied declaration will be considered as  
 "having been addressed to every one in particular who may have  
 "occasion to act upon it; and the rule of law is clear, that where  
 "one, by his words or conduct, *wilfully* causes another to believe  
 "in the existence of a certain state of things, and induces him to  
 "act on that belief, so as to alter his own previous position, the  
 "former is concluded from averring against the latter a different  
 "state of things existing at the same time."

The word *wilfully*, contained in that rule, has received judicial interpretation in the case of *Freeman v. Cooke* (a), where Parke, B., in referring to this doctrine, says:—"By the term '*wilfully*,' in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and, if whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting it." That rule, and the interpretation put on the word "*wilfully*," by Parke, B., is adopted by Vice-Chancellor Sir W. Page Wood, in the case of *The Attorney-General v. Stephens* (b).

In *Bartlett v. Wells* (c), the plaintiff sought, by a parol statement, to get rid of a personal disability in the defendant to contract, which the law had imposed on him. In *The Thames Iron Works and Ship-building Company v. The Royal Mail Steam-Packet Company* (d), the replication set up a discharge by parol of a stipu-

(a) 2 Exch. 654; S. C., 6 Dowl. & L. 190.

(b) 1 K. & J. 748.

(c) *Ubi supra*.

(d) *Ubi supra*.

lation contained in a contract under seal. That is not the effect of the replication in the present case; it does not contradict the contract declared on in the plaint, but is consistent with it; the effect of the replication is to set up a state of facts which preclude the defendant from relying on that contract: *Wing v. Harvey* (a).

With regard to the argument, that estoppel by conduct does not apply to contracts under seal, CHRISTIAN, J., in his judgment in the case of *Armstrong v. Turquand* (b), referring to the cases of *Simpson v. The Accidental Death Insurance Company* (c) and *Tyerman v. Smith* (d), says:—"The first goes far to show (though not "actually deciding it) that, in the opinion of the Bench and Bar "in England, estoppel by conduct is not, as was insisted here, confined to cases of contract by parol, but applies equally to contracts "by deed."

Another ground for supporting this replication is, that it will prevent circuity of action: *Cormoss v. Levy* (e). The plaintiff could maintain an action of tort for false representation against the defendants. In the case of *Wood v. Dwarries* (f), it was argued that the replication was bad, because a Court of Equity would not give relief without first reforming the instrument; but it was held, that a Court of Law may, under the Common Law Procedure Act, give equitable relief without the instrument being first reformed. And Pollock, C. B., says:—"Moreover, I think that, under the "statute, if a defence be set up, which ought not to be pleaded, "and to which there is a good equitable answer, we ought to "admit it, notwithstanding a Court of Equity may be precluded by "its rules from entertaining such a defence until the contract has "been reformed."

On the general principle of estoppel *in pais* they cited, *Stone v. Godfrey* (g); *Simpson v. The Accidental Death Insurance Company*; *Tyerman v. Smith*; *Pickard v. Sears* (h); *Gregg v.*

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(a) 5 De G., M. & G. 265.

(c) 2 C. B., N. S., 257.

(e) 11 Q. B. 769.

(g) 5 De G., M. & G. 76.

(b) 9 Ir. Com. Law, 62.

(d) 6 Ell. & Bl. 719.

(f) 11 Exch. 493.

(h) 6 Ad. & Ell. 469.



M. T. 1863. *Wells* (a); *Freeman v. Cooke* (b); *Hawker v. Halliwell* (c); *Foster v. The Mentor Life Assurance Company* (d); and, on the reformation of the instrument, *Luce v. Izod* (e).

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Serjeant *Sullivan*, in reply.

The case of *Wood v. Dwarries* (f) was decided soon after equitable pleas were allowed, and it has not since been followed; and in that case the contract was not under seal. From the way the pleadings are framed in this case, the plaintiff cannot rely on the matters set up in his replication by way of estoppel; for he has set out the whole contract in his summons and plaint, including the condition which he seeks to get rid of by his replication. The pleadings were differently framed in *Wood v. Dwarries*. In that case it was the defendant who set up the condition; and the effect of the replication was merely to put a gloss on the word "untrue," which occurred in the condition, and to make it equivalent to "fraudulently untrue." *Wing v. Harvey* (g), and that class of cases, are no authorities for the present; for the matters relied on in them occurred subsequently to the date of the instrument.

He cited *De Roo v. Foster* (h).

H. T. 1864. On this day MONAHAN, C. J., delivered the judgment of the Court.  
Jan. 25.

This is an action against the defendants, as trustees of an Insurance Company, on a life policy under seal effected by the plaintiff on the life of Rose Helen Meredith, dated the 5th of March 1859. The summons and plaint states that plaintiff delivered to the Company a declaration or statement that was to form the basis of the contract, dated the 17th of February 1859. Rose Helen Meredith survived the 5th of March 1860; and plaintiff paid a second premium.

(a) 10 Ad. & Ell. 90.

(c) 3 Sm. & Gif. 194.

(e) 1 H. & N. 245.

(g) *Ubi supra*.

(b) *Ubi supra*.

(d) 3 Ell. & Bl. 48.

(f) *Ubi supra*.

(h) 12 Sc. C. B., N. S., 272.

After payment of the second premium, Mrs. Meredith died, and plaintiff alleges that the £200 became due on the policy. To this the defendants pleaded that it was provided, by the proposal, that if the declaration contained any untrue statement the policy should be null and void, and all premiums paid on foot thereof forfeited to the Company. And it avers that the age of the lady assured, at the time of making the policy, exceeded fifty-six years; fifty-six years being the age mentioned in the proposal; and therefore that the policy became void, and all payments made on foot thereof forfeited to the Company. To this plea or defence, the plaintiff has replied on equitable grounds:—That before and at the time of affecting the policy, he was in communication with the defendants, and, all through such communication and negotiation, defendants intending that plaintiff should believe and act in the belief, that the life of the said Mrs. Meredith did not exceed fifty-six years, by their conduct caused him to believe, and act in the belief, that her age did not exceed fifty-six years; that he had no other means of knowledge as to her age; and that, acting on the information so obtained from the said defendants, he made the proposal containing the statement as to the age of Mrs. Meredith; and therefore he alleges that the Company should not be permitted to plead such a defence or aver that the age of this lady exceeded the said period of fifty-six years. To this replication the defendants have demurred. The case has been argued at considerable length; and certainly has undergone a great deal of discussion and consideration. Defendants' Counsel argue that the effect of the replication is an endeavour to alter the contract stated in the summons and plaint; and that it is, in effect, a departure from the summons and plaint: and further, that the contract between the parties being, by instrument under seal, cannot be varied by acts or conversations, before or at time of entering into the solemn contract between the parties, under seal. And there can be no doubt, if the effect of plaintiff's replication would be to vary the contract stated in the summons and plaint, that defendants' argument would be well founded. As, when a written contract is entered into between parties, even though not under seal, it is quite clear that this written contract cannot be

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varied by evidence of parol conversations or statements antecedent to or cotemporaneous with the execution of the written contract. Plaintiff's case, in answer to this argument, is, that the representation in question is no part of the agreement or contract; but that, by reason of the defendants making these representations, he was induced to enter into the agreement; and therefore, that in any proceedings between them in relation thereto, the defendants are in fact estopped from denying the truth of the representations so made by them. For the purpose of this demurrer, we must assume that the defendants made the representations in question, as of a fact within their knowledge, in order to induce the plaintiff to enter into the contract in question; and that in consequence of such representation the plaintiff made the proposal for the insurance in question. This being so, the question is, does the doctrine of the case of *Pickard v. Sears* (a) apply to a case like the present?

The rule is thus laid down—That where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

In the case of *Freeman v. Cooke* (b) the word "wilfully" is explained to mean, if not that the party represents to be true what he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if whatever a man's real intention be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was intended he should act upon it, and did act upon it as true, the party making the representation would be equally concluded from contesting its truth. Baron Parke, who delivers the judgment of the Court, then proceeds to show how acts of omission come within the same rule; as a retiring partner omitting to give notice of his having done so, and who is therefore bound by the contracts of the continuing firm.

(a) *Ubi supra.*

(b) 2 Ex. Rep. 654.

In *Cornish v. Abington* (a) it is laid down that the word "willingly," in the rule in question, means no more than voluntarily. It seems clear that the case as stated by the plaintiff falls literally within the words of this rule. He alleges that the statement as to the age of Mrs. Meredith was made by the Company, for the purpose of inducing him to send forward the proposal, and take out the policy; and that he did so accordingly. Is there then any objection to apply the rule to a case like the present—where the representation is made by one of two contracting parties, and the thing done as entering into a contract on the faith of such representation? It is true that in the case of *Pickard v. Sears* (a), and several other cases in which the rule has been applied, the representations were made, not by one of the parties to the original transaction in which the representation was made, but by a third person. In *Pickard v. Sears* the defendant purchased the goods under an execution against a person of the name of Metcalf; the goods originally belonged to Metcalf; but he had mortgaged them to the plaintiff Pickard; while the execution was in the Sheriff's hands plaintiff made no claim to the goods, but consulted with the attorney of the execution creditor as to the best mode of selling the property; and advised Metcalf to raise money to pay off the execution creditor. It was conceded at the trial that plaintiff's mortgage was *bona fide*, and the goods therefore in fact his; and also, that the defendant had purchased the goods *bona fide*, without notice of plaintiff's mortgage. The case was tried before Lord Denman, who was of opinion that nothing had occurred sufficient to deprive the plaintiff of his property in the goods in question, and he directed a verdict for the plaintiff. On motion for a new trial, Lord Denman, delivering the judgment of the Court, laid down the rule in the words I have stated, and granted a new trial; though plaintiff's property in the goods could have been legally parted with only by sale or gift; and though no suggestion had been made of either having taken place; and that the question should be left to the jury, whether he had not in fact ceased to be owner.

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(a) 4 H. & N. 549.

(b) *Ubi supra*.

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In *Heane v. Rogers* (a) the question was, whether in an action by a bankrupt against his assignees disputing the bankruptcy, the plaintiff was estopped from doing so, in consequence of some act of his under the Commission. The acts relied on were, assisting in the sale of the goods, and giving notice to his landlord that he was a bankrupt; and giving up possession of premises held under his lease. The former was held not sufficient; and that the assignees could not avail themselves of the latter, they being no parties to it; but the Court assumed that if he were to bring an ejectment against the landlord, to whom he had given up the premises, he would be estopped.

*Graves v. Key* (b)—A receipt on back of a bill of exchange is not conclusive evidence that it has been paid, unless in favor of some one who has acted on the receipt.

In *Freeman v. Cooke* (c), in an action by the assignees of a bankrupt against the Sheriff, for seizing bankrupt's goods under execution against C and D; when the Sheriff's bailiff went to seize, the bankrupt, thinking the execution was against himself, first told the officers they were the goods of C, and immediately after that they were the goods of D; the Sheriff seized them; the Court held that the statement of the bankrupt did not estop him. It was not found that he intended to induce the officer to seize the goods as those of Benjamin; and whatever his intention was, he immediately contradicted it by an opposite statement before the seizure was made. How could it be said that any reasonable man would have acted on the statements made by the bankrupt, taken altogether? Baron Parke then makes this observation:—"In truth, in most cases to "which the doctrine of *Pickard v. Sears* is to applied, the representation is such as to amount to the contract or the license of "the party making it. Here there is no pretence for saying it "amounted to a license, and a contract is out of the question; "the rule must be discharged."

In *Clarke and Chapman v. Hart* (d) the question was, whether under a mining partnership, the partners, in the absence of special

(a) 9 B. & C. 577.

(b) 3 B. & Ad. 318, *note*.

(c) *Ubi supra*.

(d) 6 H. of L. Cas. 633.

agreement, could declare the share of a defaulting partner to be forfeited; and incidentally the question arose, whether the defaulting party, by his admission that the power existed, did not preclude himself from asserting the contrary in the present suit. The Lord Chancellor (Lord Chelmsford), in page 655, says:—"With respect to waiving or abandoning of a right, it is necessary to understand precisely what is the qualification which has been introduced by the case of *Freeman v. Cooke* into the doctrine of the law as laid down by Lord Denman in *Pickard v. Sears*." He then repeats the rule as laid down by Lord Denman, and which I have already read. He then proceeds:—"In the case of *Freeman v. Cooke*, Mr. Baron Parke qualifies that proposition by saying, 'In most cases the doctrine of *Pickard v. Sears* is not to be applied, unless the representation is such as to amount to the contract or the license of the party making it.' So that I apprehend, where there is a vested right or interest in any party, the principle of law, as now firmly established, is, that he cannot waive or abandon that right, except by acts which are equivalent to an agreement or a license." And he then, in a later part of his judgment, proceeds to show that the declarations of the defaulting partner, in the case before the House, were not made under circumstances which had any of the essential elements of either contract or license.

In *Cornish v. Abington*, which was an action for goods sold and delivered, the defendant's defence was, that he did not deal with the plaintiff, but with one Gover, as principal—Gover being plaintiff's clerk,—and that he had settled with him. The jury however found that, though the defendant may have really thought he was dealing with Gover, yet still that he acted so—by accepting the goods under invoice in the plaintiff's name—as to induce the plaintiff to believe that he was dealing with the defendant; and therefore defendant was held liable to plaintiff. The Chief Baron, in commenting on *Pickard v. Sears* and *Freeman v. Cooke*, says (p. 555):—"Lord Wensleydale, in *Freeman v. Cooke*, commenting on *Pickard v. Sears*, pointed out a limitation of the application of the rule, viz., that, in most cases to which the doctrine is to be applied, the representation is such as to amount to the contract or license of

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H. T. 1864. *Common Pleas* “the party making it.” The Chief Baron then says:—“No doubt, unless the representation amounts to an agreement or license, or is understood by the party to whom it is made as amounting to that, the rule would not apply.” He then comments on the word “wilfully,” in Lord Denman’s judgment, and proceeds:—“If any person, by a course of conduct or actual expressions, so conduct himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he should do so or not, it has the effect that the party using the language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct.”

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Such being the cases in which the rule has been laid down, it remains to consider whether the facts stated by the plaintiff, in the replication in the present case, bring this case within the operation of that rule. The pleader has actually used the words in which the rule is laid down in the most recent cases; and of course, on demurrer, we must assume that he will be able to prove this: and if we are to inquire whether the representation, as stated in the replication, amounts to a contract, as stated to be necessary in some of the more recent cases, I confess I do not see any difficulty in reading it as a contract, something to this effect:—That, in consideration that the plaintiff, at the request of the defendants, would forward a proposal, and take out a policy in the form used by the Company, the defendants undertook that the life assured was of the age stated in the proposal, and would admit it to be so in any proceedings brought for recovery of the amount of the policy. But then it has been suggested that setting up a contract of this description would be, in effect, varying the written contract between the parties; which cannot be done by parol evidence, especially when the written contract is under seal. It does not strike me in this way. I do not think an agreement, such as I have suggested, at all alters the written agreement between the parties: that agreement remains as it was. The other is a mere collateral agreement, not altering the effect of the written one, but containing matter which, at law, would be the foundation of a cross-action; and would, to say the least of it, be an equitable replication, showing that the

defendants ought not, in good conscience, be allowed to plead such a defence. H. T. 1864.

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The present case occurs to me to be, in principle, the same as *Wood v. Dwarries (a)*, which, as here, was an action on a policy precisely similar to that in the present case; and in which the defendants relied on the fact that the party assured was older than stated in the proposal; to which plaintiff filed an equitable replication, that the defendants, previously to effecting the policy, issued a prospectus, stating that their policies should be indisputable, unless fraudulently effected; and that it was acting on this prospectus that plaintiff effected the policy. Defendants rejoined, that the policy made no reference to the prospectus, but referred merely to the proposal: and no doubt such was the written contract between the parties. But the plaintiff had judgment on a demurrer to this rejoinder; and plaintiff's replication was held good, on the ground that, though the written contract was as stated by defendants, still, as plaintiff acted on the faith of their prospectus, it would be inequitable and unjust to allow the defendants to escape the obligation imposed on them by their prospectus. So here, it occurs to me, it would be unjust and inequitable to allow the defendants to aver contrary to the statements made by them; on the faith of which plaintiff, as he alleges, effected the policy in question.

In *Simpson v. The Accidental Death Assurance Company (b)*, which was an action on a life policy, defendants pleaded the non-payment of the last premium. Plaintiff replied that the defendants, by their acts and conduct, induced the plaintiff to believe that the premiums had in fact been paid. No question was raised as to the validity of this replication; but it was held that no such representation was made; and that, under the terms of the policy, the defendants were not bound to continue the policy or receive the premiums; and therefore that the action was not maintainable.

Another case, that bears some analogy to the present, is a case which we had before us, in this Court, during the present Term\*—

(a) *Ubi supra*.

(b) *Ubi supra*.

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\* NOTE.—The case referred to by the LORD CHIEF JUSTICE was the case of *Fitzgibbon v. Walshe*, which was a motion to set aside an equitable defence. The



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namely, an action, by Master Fitz Gibbon, against a party who became surety for a tenant under the Court of Chancery. Defendant filed an equitable defence, that he became such surety on the faith of an order and representation that he was to be only one of two sureties; and that, without his knowledge, the Master rescinded the order requiring two sureties, and took only one. It was conceded that such state of facts would afford an equitable defence to the action.

The only case that was cited during the argument, apparently inconsistent with this doctrine, was the case in which, to a plea of infancy, in an action against an infant, a replication, that the infant fraudulently represented himself of full age, was held not to be sustainable; and that, if it were, it would amount to a departure, turning an action of contract into one of tort. That case was not intended in any way to question the doctrine of the cases to which I have referred; and I have no doubt was decided on the peculiar protection afforded to infants, who are not liable for any contracts or representations in relation to them.

On the whole therefore, after the best consideration we have been able to give this case, we have come to the conclusion that this case comes within the principle of the case of *Pickard v. Sears*, and the others to which I have referred; that the evidence here does not contradict or vary the contract under seal, but is an independent parol collateral contract, which would afford the grounds of an action against the defendants; and therefore may be used as an equitable replication to defendants' defence.

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action was brought in the name of Gerald Fitz Gibbon, Esq., the Receiver Master, upon an agreement in writing whereby the defendant became surety to the plaintiff for the payment by the lessee of the rent reserved under a lease made by the plaintiff as such Master. The defence was, that at the time when the defendant entered into the agreement in the summons and plaint mentioned, it was agreed between the plaintiff and defendant that there should be two sureties for the payment of the rent by the lessee; and that those acting for the plaintiff had represented to the defendant that there would be a second surety, and that a lease would not be executed by the plaintiff until such second surety had been obtained; and that contrary to that agreement, and notwithstanding those representations, the plaintiff had taken only one surety. No rule was made on the motion; the defendant undertaking to furnish particulars of the representations relied on in the defence, and the plaintiff to have liberty to reply and demur.

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TYRRELL v. THE IRISH SOCIETY.

May 23.

THE plaintiff complained that the defendants, on the 11th of June 1862, in a certain close called the "Slob Lands of Lough Foyle," in the county of Londonderry, took certain specified goods and chattels of the plaintiff, to the value of £978. 12s.

The defendant's pleaded and avowed the taking as a distress for half a-year's rent due on the 31st of December 1861, by the plaintiff, as tenant to the defendants, under a demise of the slob lands of Lough Foyle, on the south side, at the yearly rent of £800, payable half-yearly.

To this avowry the plaintiff filed the following replication:—  
 "That before and at the time of the demise therein mentioned, the  
 "Wardens and Commonalty of the Mystery of Fishmongers of the  
 "city of London, and the Wardens and Commonalty of the Mystery  
 "of the Grocers of the city of London, and divers other persons, to  
 "wit, one David Kirkpatrick, Samuel Elder, James Galbraith, and  
 "Thomas Scott, and others, were, and from thence have been, and  
 "still are, in the lawful possession, use, occupation, seizin and enjoy-  
 "ment of divers, to wit, 100,000 acres, parcel of the said premises  
 "in the plea mentioned, as tenants in fee thereof, to wit, under grants  
 "thereof by the said defendants, prior to the said demise, whereby  
 "the plaintiff, or those claiming under the said demise, did not and  
 "could not enter into possession, or hold or enjoy the said last-  
 "mentioned lands, as being parcel of the said demised premises in  
 "the plea mentioned, or any part thereof. And although the plain-

To an avowry in an action of replevin of distress for rent, the plaintiff replied, in effect, that he was prevented from obtaining possession of the lands demised, because that, prior to said demise to him, a portion of the lands was, and still continues, in possession of certain persons, who derived as tenants in fee, under the defendants. Upon the evidence at the trial, it was not clear whether the parties so in possession derived under the defendants or by title paramount. The learned Judge told the jury that it was, in his opinion, immaterial to the issue, whether they derived under or independ-  
 ently of the

defendants; and that the substance of the issue was, whether the plaintiff had got the entire quantity of the land demised.—*Held*, a misdirection, and that whether material or not, the jury were bound to find in the terms of the issue.

*Held also*, that notwithstanding that leave had been reserved to enter a nonsuit in case the Court should be of opinion that the plaintiff had failed to prove the replication in terms, that a new trial should be directed, inasmuch as the Court would have the power of amending the replication, so as to raise the substantial question at issue between the parties.

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"tiff and all those claiming under the said demise have, and always  
 "has, from the time of making the said demise in the plea men-  
 "tioned, been ready and willing, and desirous of entering into  
 "the possession and occupation and enjoyment of the said last-  
 "mentioned land, under and by virtue of the last-mentioned  
 "demise, whereof the defendants had notice; yet, from the time  
 "of making the said demise, hitherto the plaintiff and all persons  
 "claiming under the said demise have and has been, and still are  
 "and is kept out of the possession, use, occupation, seizure and  
 "enjoyment of the said last-mentioned lands, and every part  
 "thereof, and of all profits from the same, by the said persons  
 "herein before mentioned; whereby the plaintiff has been wholly  
 "hindered and prevented from entering into and holding and  
 "enjoying the same, and from having and receiving any benefit,  
 "profit or advantage which might and otherwise would have  
 "arisen and accrued to the plaintiff therefrom."

The issue was, whether the replication was true in substance and fact?

The action was tried at the Derry Spring Assizes 1862, before Hayes, J. The plaintiff gave in evidence the Reclamation Acts, 1 and 2 Vic., c. lxxxvii., and Acts amending same; and proved an agreement, dated the 21st day of May 1838, between the defendant and Dimsdale and Robertson, two of the undertakers named in the first Act, for a demise of the entire of the slob lands of Lough Foyle, on the south side, for 100 years; and they produced and proved a lease, dated 7th June 1845, whereby the Irish Society demised, to said Dimsdale and Robertson, all the waste land, mud-banks or slobes of Lough Foyle, on the south side of the said lough, from and opposite Culmore Fort down to the river Roe, and also from the river Roe to Magilligan Point, as far as the same may be embanked without injury to navigation; to hold said premises from the 1st of January 1837, for 100 years, at the yearly rent of £300 during seven years, to be computed from the 1st of January 1844; and during the next thirty-six years at the yearly rent of £800; and during the residue of the term at the yearly rent of £1000, payable half-yearly. The lease contained the usual clause of distress and entry in case of nonpayment.

The plaintiff was assignee of Hemming, who was assignee of one of the shares which had been allotted in severalty on a partition between Dimsdale and Robertson. A map was referred to and proved, by which it appeared that the slob lands in question, before the reclamation, extended along the south side of Lough Foyle for several miles; and that the owners of the adjacent lands were, first, Thomas Scott and his tenants, who held in perpetuity under him the lands of Donaghewer; secondly, the Grocers' Company; thirdly, the Fishmongers' Company; and, fourthly, the Bellarena estate, the property of the representatives of the late Conolly Gage.

The plaintiff was unable to prove that any portion of the lands in question was in possession of parties who derived title under the Irish Society. At the close of the plaintiff's case, Counsel for defendants called for a nonsuit, on the ground that the replication was not proved. The learned Judge refused to nonsuit; but reserved liberty to the defendant to move for liberty to have one entered.

The defendants then went into evidence to show that the defendants had recognised a certain boundary line, which ascertained the contents of the lease; and that the plaintiff was in possession of the lands so defined; although the ambit of the demise was greater. The learned Judge, in his charge to the jury, told them that, in his opinion it was, for present purposes, immaterial whether the parties, proved to be in possession of the portions of the demised premises before and since the demise, had derived under the Irish Society or not; that it was the duty of the lessors to see that they did not undertake to demise more than they had a right to demise or to give possession of; and that if they did so demise at a gross rent, and afterwards distrained for that rent, they must be defeated in the present action. Counsel for defendants objected that the learned Judge had told the jury that the only question for them to consider was, whether or not the plaintiff had got possession of all that had been demised by the deed of 1845; and that the substance of the replication was, that the plaintiff had not got possession of all that he had so bargained for; and that it was immaterial for the plaintiff

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to prove whether the parties keeping him out of possession claimed under the Society or not. The defendants obtained a conditional order to set aside the verdict for the plaintiff, and that a nonsuit should be entered, or that the verdict should be set aside, and trial should be had, on the ground of misdirection of the learned Judge; or that judgment should be entered for the defendant, *non obstante veredicto*, notwithstanding the verdict for the plaintiff.

*Dowse* (with whom was *J. P. Hamilton*) showed cause.

This is not the case of an eviction by title paramount, but of a defect in the original grant, and a consequent suspension of the rent. It is distinguishable from the recent case of *Mercer v. O'Reilly* (a). There the party was evicted from what had been in his possession; but it is impossible that a person could be evicted from what he had never been in possession of. This replication is sufficient, because it shows a suspension of the rent, which negatives the right to distrain. But assuming that it was an eviction, then the rent was apportionable; and if so, no right of distress existed until it was apportioned, and therefore the distress was illegal. The following cases were cited: *Upton v. Townsend* (b); *Gardiner v. Williamson* (c); *Neale v. Mackenzie* (d); *Furlong's Landlord and Tenant*, pp. 358, 737; *The Ecclesiastical Commrs. v. O'Connor* (e); *Tomlinson v. Day* (f); 1 *Wms. Saunders*, p. 204; 23 & 24 *Vic.*, c. 154, s. 44; *Regnard v. Porter* (g); 2 *Coke's Inst.*, 503; *M'Loughlin v. Craig* (h); *Bacon's Abr.*, tit. *Rent*; *Brown v. Sayer* (i); *Goodman v. Ayling* (k); *Potter v. North* (l); *Duppa v. Mayo* (m); *Roberts v. Snell* (n); *Smith v. Malings* (o); *Ewer v. Moyle* (p); 2 *Co. Inst.*, 503; *Sergeant v. Chafy* (q); *Smith v. Walton* (r).

(a) 13 Ir. Chan. Rep. 152.

(c) 2 B. & Ad. 336.

(e) 9 Ir. Com. Law Rep. 248.

(g) 7 Bing. 457.

(i) 4 Taunt. 319.

(f) 1 *Wms. Saunders*, 347.

(n) 1 M. & Gr. 577.

(p) Cro. Eliz. 771.

(b) 17 C. B. 75.

(d) 1 M. & W. 747.

(f) 5 Moo. 598.

(h) 7 Ir. Com. Law Rep. 117.

(k) *Yelverton's Rep.* 148.

(m) 1 *Wms. Saunders*, 286.

(o) Cro. Jac. 160.

(q) 5 Ad. & Ell. 356.

(r) 8 Bing. 235.

*Brooke* and *M'Causland*, contra.

The rent here is reserved under lease by seal. That is the rent for which *prima facie* the defendants were entitled to distrain; and it lay upon the plaintiff to show that only a part should be distrained for. Once it is shown that the rent is apportionable, the plaintiff is put out of Court on the authority of *Neale v. Mackenzie*. The 44th section of the Landlord and Tenant Act must embrace this case, and it cannot be distinguished from the case of *Mercer v. O'Reilly*. The defendants are entitled to have the verdict entered up for them, because there is an important averment in the plea which has not been proved; what was proved by them amounted to an eviction by title paramount: *M'Loughlin v. Craig* (a). That case is not distinguishable from the present. They also cited: *Stevenson v. Lamrard* (b); 11 G. 3, c. 19, s. 159; 23 & 24 G. 3, c. 46; *Kennan v. Brennan* (c); *Hodgkins v. Robson* (d); *Philpot v. Dobbinson* (e); *Burke v. Dignan* (f).

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*Hamilton*, in reply.

*Cur. ad vult.*

MONAHAN, C. J.

In this case, the conditional order which was obtained by the defendants is twofold—first, that the verdict be set aside, and a nonsuit entered, pursuant to leave reserved; or, secondly, that the verdict be set aside, and a new trial granted, on the ground of misdirection. The facts of the case are these:—It was an action of replevin, in the common form, in which the plaintiff complained that the defendants entered a certain close, called the slob lands of Lough Foyle, and took certain of his cattle and goods, therein mentioned. The Irish Society pleaded to that action, what, under the former system, would be called an avowry. They alleged that the taking was under a distress for half-a-year's rent, due by the plaintiff as tenant to the defendants, under a demise of the slob lands of

June 27.

(a) 7 Ir. Com. Law Rep. 117.

(c) 7 Ir. Com. Law Rep. 268.

(e) 3 Moo. & P. 320.

(b) 2 East, 577.

(d) 1 Vent. 276.

(f) 3 Ir. Law Rep. 368.

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Lough Foyle. In answer to that, Mr. Tyrrell filed a replication, the substance of which is, that he was prevented from obtaining possession of the entire of the lands mentioned in the plea, and demised to him, because that, prior to the demise to him, a portion of the lands were in the possession of certain other persons, *who derived as tenants in fee under the Irish Society*. It appeared, at the trial, that parts of the lands were in the possession of other persons, who were seised in fee, but did not derive from or under the Irish Society. We are not now called upon to decide whether or not, under the principle recognised in the case of *Neale v. Mackenzie (a)*, a good plea could be framed, omitting the matters stated under the *videlicet*—namely, that the persons in possession derived under the Irish Society. We, at present, abstain from deciding that point: it is a most important question, and one of considerable difficulty. The only question which we now decide is, what is the substance of the replication. It is, not merely that certain persons were in possession of certain portions of the premises demised to the plaintiff, but also that they derived under the Irish Society. Our decision is, that the learned Judge was wrong in telling the jury that it was immaterial whether the parties, proved to have been in possession of portions of the demised premises, had derived their title under the Irish Society or not; and that, as the replication was pleaded, an essential portion of it was that the parties derived under the Irish Society. It is, as I have already stated, another question whether a good replication could not be prepared, omitting that statement. We are therefore of opinion that the verdict cannot be upheld, because of that misdirection.

The question then is, shall we enter a nonsuit, upon the ground of a failure in the proof of the replication? If we were to act upon the principle *stricti juris*, we might make an order to that effect; but we do not think that we ought to make any such order; because, if the Judge had considered the law to be what we think it is, and if accordingly he had decided that the replication had not been proved, it would have been competent for the plaintiff's Counsel to apply to amend the replication, by omitting that portion of it which he failed

(a) 1 M. W. 747.

to prove, and the Judge would have allowed him to do so, upon such terms as he might have thought proper to impose. If the verdict was now entered up for the defendant, it might be the means of depriving the tenant of a defence which would have the effect of suspending the entire rent if Mr. *Hamilton* be right, or a portion of it if Mr. *Brooke* be right.

We think that, under all the circumstances, the proper course will be, to make absolute the conditional order for a new trial; and to direct each party to abide his own costs of the conditional order and of this motion.

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M'MAHON v. ELLIS and others.

E. T. 1863.  
April 21, 22,  
23, 24, 27.

THIS was an action for disturbing the plaintiff in his office of weighmaster of the town of Clones.

The nature of the first and second counts is fully stated in the judgment of the Court. The defendants pleaded several defences, to which there were replications, followed by rejoinders and surrejoinders. There were nineteen issues settled for trial; but it is

In an action for the disturbance of the plaintiff, in his office of weighmaster of the town of C., which was neither a county of a city nor a borough, evidence that,

so far back as legal memory extended, there was a monopoly of weighing for the market at C., at certain charges, for which there was no legal warrant or explanation, but prescription and, that such monopoly had been claimed and exercised by the lord of the manor, or persons claiming under him, was *held* admissible, for the purpose of showing that C. was a market town, in which the office of weighmaster, under the 4th *Anne*, c. 14. (*fr*)., legally existed under the appointment of the person to whom the tolls and customs belonged.

The office of weighmaster, under the statute of *Anne*, being a freehold office, and for the non-appointment of a person to fill which the lord of the manor would have been liable to penalties, proof of a party having acted as such weighmaster, coupled with the fact of his having paid a craneage rent to the lord of the manor, is evidence to go to the jury of his having been legally appointed.

*Held also*, that a proof of negative search, instituted for the purpose of showing that a party had not taken the Roman Catholic oath required by the 10 G. 4, c. 5. s. 10, which search did not exhaust the depositories specified in 20th section, was not sufficient to rebut the inference of law, that, in the absence of proof to the contrary, the party had duly qualified; and, that had such a search been exhaustive, that it would not have altered the case, because the party was not responsible for the non-recording of the oath.

Where a former verdict, and judgment founded thereon, established the fact of a tenancy from year to year having subsisted in 1851, the legal presumption of its continuance is not rebutted by evidence of a forcible possession having been subsequently taken by the landlord.



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only necessary to advert to the following, as bearing upon the questions before the Court:—

1st—Whether the office of weighmaster, under the statute of the 4 *Anne*, existed in the market town of Clones, in manner and form as stated in the first count of the summons and plaint?

2nd—Whether the plaintiff is now, and has been, weighmaster, and in possession of the office of weighmaster of the market town of Clones, by virtue of the statute of 4 *Anne* in manner and form as stated in the said first count?

3rd—Whether the plaintiffs, took the oaths mentioned in the 3rd section of said statute of 4 *Anne*, as directed to be taken by said statute?

5th—Whether the plaintiff always professed the Roman Catholic religion; and whether, within the period, and in the manner, and at the place stated in the second replication to the third plea, he duly took and subscribed the oaths appointed by the statute 10 *G.* 4, c. 7, as required by said Act?

8th—Whether the defendants broke and entered the house in the said count mentioned as therein alleged?

14th—Whether, at the commencement of this action, and at the time of the committing of the supposed trespass, wrongs and grievances, for which damages are sought by the second count, the plaintiff was tenant from year to year, of any portion of said ground story of said market town, other than the part called the office?

15th—Whether the tenancy from year to year, found by the jury in the suit in the second count mentioned, was, at the commencement of this action, and at the time of the committing of the trespass, and for which damages are sought by said count, a subsisting tenancy from year to year?

16th—Whether the defendant committed the trespasses for which damages are sought by the said second count?

19th—Whether the causes of action in the summons and plaint mentioned occurred before the action.

The action was tried at the Sittings after Hilary Term 1863, before MONAHAN, C. J., when a verdict was found for the plaintiff

in the affirmative of the foregoing issues, except as to a portion of the last, subject to a bill of exceptions, taken to the charge and rulings of the Lord Chief Justice.

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The evidence and exceptions, as stated in the bill of exceptions, are extremely voluminous, and being, in substance, fully stated in the judgment of the Court, it will not be necessary to set them forth *in extenso*.

*H. Ellis and J. E. Walsh*, for the defendants, in support of the exceptions.

*E. M. Kelly and Hemphill*, contra, for the plaintiff.

*Cur. ad. vult.*

The judgment of the Court was delivered by CHRISTIAN, J.

T. T. 1863.  
June 11.

The judgment which I am about to read is that of the three Members of the Court before whom this case was argued—namely, my LORD CHIEF JUSTICE, my Brother BALL, and myself.

The case is before us upon a bill of exceptions. The plaintiff contained three paragraphs. The first averred that for fourteen years, last before the filing of the plaint (which was on the 18th May 1859), the plaintiff was weighmaster, and possessor of the office of weighmaster, of the market town of Clones, under the statute of the 4 *Anne* (*Ir.*), c. 14, and of the emoluments thereto belonging; that he was provided with beams, scales and weights, which were set up in the market-house of Clones; that the defendants, on the 6th June 1851, broke and entered the market-house, and ejected, expelled and removed the plaintiff therefrom, and kept and continued him so expelled, &c., from thence hitherto; that they seized and carried away his beams, scales and weights, and thereby *and otherwise, from said 1st June 1851 hitherto*, hindered and disturbed him from exercising his said office, and prevented him from receiving the fees and emoluments thereof. Thus, in that count, the material averments were, that the plaintiff lawfully held the office, under the statute of *Anne*; that, eight years before the commencement of the action, the defendants disturbed him in it, and prevented him from exercising it or receiving the fees; that such

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disturbance and prevention were continued down to the bringing of the action; and, in addition to this general averment of disturbance, there were averments of two particular acts of disturbance—namely, that they expelled him from the market-house, and carried off his beams, weights and scales. The second count averred that the plaintiff was tenant from year to year, under Sir T. B. Lennard, of the ground story of the market-house; that the defendants, on the 6th June 1851, broke and entered it, and expelled him, and have since kept him so expelled; that, on the 12th June 1851, he brought an action in the Queen's Bench for that trespass, in which he obtained a verdict, by which the jury found that he was tenant from year to year of a certain *part* of the said ground story, called the office, and gave him £25 damages; upon which verdict he, on the 13th November 1851, obtained judgment: and it then goes on to aver that, though the tenancy from year to year, so found by the jury, is still subsisting, the defendants have, since the time to which damages were recovered in said action, continually hitherto kept, and still do keep, the plaintiff ejected, expelled and removed from the possession of said ground story, including the said part called the office; for which continuance of trespass, since the time to which damages were recovered in the former action (*i. e.*, since the commencement of *that* action) only, the plaintiff now complains. The third count was a more general one, alleging a tenancy from year to year in the ground story; an expulsion, attended with certain special damage; and a taking and carrying away of certain goods.

Whether the facts thus averred in these counts, or in each or either of them, constitute a cause of action good in law, is a question with which we have no concern whatever upon the present occasion. The defendants have not demurred to the plaint; nor, as yet at least, moved in arrest of judgment. They have pleaded to each count a number of special defences. These pleas have produced replications; the replications have produced rejoinders; and the rejoinders, sur-rejoinders. From these three distinct lines of pleading have resulted three distinct groups of issues, appropriate to the three counts respectively; upon which issues the case

went to trial. The duty of the Judge, at the trial, was, simply and merely to try those issues. The only legitimate subject for exceptions was the manner in which he discharged that duty. Unless the jury were misdirected upon some one or more of the precise and specific issues, as they stood on the abstract for *Nisi Prius*, whatever may be, in other respects, the infirmity of the plaintiff's case, he must succeed upon this bill of exceptions. This very obvious and commonplace observation I make thus early, because it will be found that it effaces at once nine-tenths of what was urged in argument upon the part of the defendants.

I shall now proceed to consider, in their order, the issues into which the two first counts of the plaint have branched, with the exceptions applicable to each respectively. The third count is immaterial; as the issues founded on it have either been found for the defendants, or withdrawn by consent, and are not the subject of any exceptions.

To the first and most important of the counts, with the pleadings appropriated to it, there were thirteen issues exclusively applicable, besides another which was common to it with the other two—*i. e.*, fourteen in all. From five of those issues the jury were, by consent, discharged. They all fell to the ground in consequence of the plaintiff's failure to give any proof in support of the ninth issue, which had been taken on his plea of the Indemnity Act, 21 & 22 of *The Queen*, and upon which latter issue accordingly (one of the fourteen) the defendants obtained a verdict. Of the eight which remained, the first five, taken together, raised the substantial question in the case—namely, whether the plaintiff was a legally constituted weighmaster for the town of Clones, under the statute of *Anne*. Three essential elements were involved in that question, and were separately presented by the issues—*viz.*, first, was Clones a town in which the statutable office could exist at all? Secondly, if it was, was the plaintiff duly appointed to the office? Thirdly, if he was, did he take certain oaths, required by law? Of the remaining three issues, two were taken upon the two special acts of disturbance laid in the first count—namely, first, the converting the beams, scales and weights (which was found in

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M'MAHON counts, and was upon the plea of the Statute of Limitations.  
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upon the general averment in the first count, of a *continuous* disturbance down to the commencement of the action; not only by keeping the plaintiff expelled from the market-house, but generally by hindering him from exercising his office, and from receiving the fees and emoluments thereof. There was therefore no issue which opened up, as a subject which could be dealt with upon the trial, a question which might have been, but was not, made the subject of an issue, which might possibly have been raised by a demurrer to the plaint, which may possibly be raised (if it be of any value at all) upon a motion in arrest of judgment or on a writ of error (I offer no opinion whether it can or not), but which, with entire irrelevancy, has been argued at the present stage—namely, whether, assuming the plaintiff to have succeeded in establishing an original title to the office, the mere continuance, within six years last before the commencement of the action, of an exclusion which was completed more than six years before it, constitutes, in law, a disturbance in his office, for which an action like the present can be maintained.

The exceptions, in whatever else they may fail, are certainly not defective either in number or in comprehensiveness. They consist of two great divisions,—those taken at the close of the plaintiff's evidence, and those taken at the close of the Chief Justice's charge. The first division contains eighteen exceptions; the second, twenty-two; forty in all. The first exception of each set may be said to present an epitome of them all. It called upon the Chief Justice to nonsuit the plaintiff, or direct a verdict for the defendants, on the ground that there was no evidence to go to the jury to sustain the issues, or any of them. That one broad contention, that the plaintiff had no case to go to the jury upon anything, applied *seriatim* to the several issues, and repeated over and over again with more or less of diffuseness and irrelevancy, constitutes the staple of this mass of exceptions. I do not purpose to follow up the

tedious detail. The way I shall deal with the case will be this:— I shall take up the propositions propounded *by the issues*, and consider whether or not, upon all and each of them, the plaintiff produced evidence which the Judge was bound to leave to the jury. It will be easy to indicate afterwards the exceptions, which will be ruled by the conclusions arrived at upon that inquiry; and if there be any which require separate observations, I shall advert to them separately.

Keeping then within the issues, and beginning with those which were taken on the first count, the first questions which present themselves are the three which I have already indicated as embodied in the first five exceptions. The first of those three questions I shall now proceed to consider, namely, was there evidence to go to the jury that Clones was a town in which the office of weighmaster, under the 4 *Anne*, c. 14, could have legal existence?

It was insisted upon behalf of the defendants, and I think rightly, that upon the construction of the 3rd and 5th sections of the statute, the only person by whom, in market towns which are neither counties of cities or boroughs, the weighmaster can be appointed, is the person to whom the tolls and customs of the market town belong, and, as a consequence, that in any town in which no tolls or customs at all are leviable, the Act can have no operation. Clones is a market town, but it is neither a city nor a borough, and therefore, to bring it within the operation of the statute, it is necessary to show that tolls and customs were legally leviable there; otherwise there could be no weighmaster under the statute, because there was no one competent to appoint him.

What then was the evidence given at the trial that tolls and customs were payable in the market town of Clones?

It was proved by Dr. John Brady, whose evidence, having regard both to his means of knowledge and his trustworthiness, was beyond all impeachment, that since first he knew Clones, forty years ago, there were fixed up in five public places in the town, namely, in front of the market-house, in front of the shambles, and in three public streets, large boards having painted on them a list of tolls and customs. They were headed "Tolls and Customs,"

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and at foot of the list there was the name of Hugh M'Mahon, who was the person at that time acting in the collection of these imposts thus designated as tolls and customs. Two other witnesses, Duffy and Reilly, gave similar evidence. By the statute of 57 G. 3, c. 108, entitled "An Act for the regulation of levying Tolls at Fairs, Markets and Ports in Ireland," it was enacted that, after the 1st of July 1818, all persons collecting customs, tolls, or duties, or claiming the same at any fair, market, or port in Ireland, should erect, affix, and keep up during the whole continuance of such fair or market, in some conspicuous place at each principal entrance of the same, a painted board having thereon a schedule, in large and legible characters, specifying the custom, toll or duty claimed on each article sold, and the names of the person collecting the same, and of the person or persons, or corporation claiming right to the same, with a penalty on the person collecting in default of compliance with the enactment. It was plainly a subject of legitimate inference, to be left to the jury in this case, that these boards, headed "Tolls and Customs," affixed in Clones in the market-house, and other public places, and signed by the collector, who was also a lessee of them under the owner, were so set up in obedience to the statute I have last mentioned; and their continued exhibition was proof or evidence of repute, and admission of the people of Clones, that tolls and customs were legally leviable in their market. There is but very indistinct evidence as to the precise nature of the charges scheduled upon those boards. The boards themselves have been long destroyed, and new ones set up by the defendants since this long-pending litigation began. So far as we can gather their contents, they certainly appear to have been fees for weighing, and not charges made for liberty to enter and use the market, or on sales effected in the market—which is probably the more usual and strictly correct meaning of customs and tolls. But there is other evidence which is free from that observation. Michael Reilly proved that in 1828 he took the "tolls of the market" for beef, bacon, pork and hides of the shambles, from Hugh "M'Mahon, for £10 a-year; and that he used to charge the "butchers for the carcass of beef six-pence, for the carcass of

"pork five-pence, for a fitch of bacon, for hides," &c., so much. T. T. 1863. These imposts were obviously not fees for weighing, but, as I understand it, for the use by the butchers of their stalls in the shambles. One Fitzgerald had received the same charges from the butchers, before Reilly, and when he (Reilly) gave them up, Hugh M'Mahon received them himself. Dr. Brady, Reilly and Duffy also proved that it was the constant usage of the market that when meal or potatoes were brought in from the country and sold in the market to town dealers, that besides the fees paid for weighing by the sellers, the buyers used to pay certain rates for the liberty of themselves re-selling them by retail upon the market, and of setting up and using there for that purpose their own scales and weights. In other words, *stallage*, i. e., payments for standings in the market, with liberty there to weigh and retail their commodities, was one of the imposts in use in Clones market. Now there is express authority that stallage is a species of toll: *Bennington v. Taylor* (a); *Lockwood v. Wood* (b). In the first of those cases it is laid down that—"Toll may well signify stallage, as a general word for such duties or payments." Well, suppose there were no more, was not all this evidence to go to the jury from which they might reasonably infer that there were tolls and customs payable in Clones? No doubt there was evidence the other way. The defendant Mr. Ellis's evidence as to this stallage did not precisely tally with Dr. Brady's and the plaintiff's other witnesses; and several witnesses examined for the defendant proved that they never knew tolls or customs paid in Clones; which of course means, according to their individual notions of the meaning of those terms. But it was for the jury to balance the evidence upon the one side and the other. It was not for the Judge to direct them. There was clearly a case for the jury, even if there were no more than I have stated. But I confess, speaking for myself, I am disposed to put the case upon a much broader basis. This at all events is clear upon the evidence, and is indeed a fact common to both parties, that as far back as living memory extends there has been a monopoly of *weighing*

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(a) 2 Lutw. 1517.

(b) 6 Q. B. 31, 43, 46.



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(a) 1 Hurl. &amp; C. 102.

(b) Vide 2 EL. &amp; EL. 61.

be excluded it is from a mere accidental slip in the language, we will only interpret these words, "tolls and customs," with the same liberality with which, in the time of *Lutwyche* the former was interpreted.

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Therefore, upon the undisputed facts of the case, not only was there evidence to go to the jury, that tolls and customs existed in Clones, but evidence upon which, if prescriptive fees for weighing satisfy the terms, it was perfectly impossible that they could do otherwise than find in the affirmative. The defendant's witnesses, who swore to the contrary, were simply mistaken as to the signification of the words. The result is, that all the exceptions which are pointed at the question embodied in the first issue must be overruled.

I now proceed to the second of the three principal questions I have mentioned, and which is the subject of the second issue; namely, whether, assuming it to be established that the office, under the statute, could have legal existence in Clones, Mr. *M'Mahon* was duly appointed to fill it?

In the case of *M'Mahon v. Lennard and others* (a), it was held by the House of Lords (affirming the decision of the Court of Exchequer Chamber in this country) that the office of weighmaster, under the statute of *Anne*, is a freehold office, the appointment to which *must* be for life, or during good behaviour, but *may* be made by parol; and that the principle established by *M'Gahey v. Alston* (b), and many other cases, that acting in an office is *prima facie* sufficient proof of appointment, is applicable to this office, under the statute of *Anne*. Starting from that secure basis, the question then is, whether there was evidence to go to the jury of *such acting* in the present case?

The plaintiff asserts that he has proved that, from his father's death in 1845, till he was disturbed by the defendants in 1851, he performed in Clones the duties appropriate to the statutable weighmastership; and that is, he says, sufficient presumptive proof of appointment. On the other hand, the defendants assert that these actings of the plaintiff were attended by certain circumstances, which

(a) 6 H. of L. Cas. 970.  
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(b) 2 Mee. & W. 206.  
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repelled the possibility of attributing them to the statutable source; and therefore, they say, the plaintiff has given *no* evidence of appointment. In order properly to appreciate these contentions, it is necessary to advert to the state of things which existed in Clones during the period in question.

There was, as I hope I have shown already, clear evidence from which the jury could come to the conclusion that tolls and customs were payable in Clones. During the argument, the plaintiff's Counsel seemed to fence with the question as to who was the owner of those tolls, in a way, the motive of which, I confess, I did not understand. In my mind it is perfectly evident, on the proofs, both parol and documentary, that that person was Sir T. B. Lennard the lord of the manor of St. Tierney. The consequence was, that Sir T. B. Lennard was bound by law to appoint and swear a weighmaster, under the statute of *Anne*, and was subject to a penalty of 40s. a-month for so long as he neglected to do so. Now, this is perfectly certain that, unless he fulfilled that legal duty in the person of Mr. M'Mahon, he did not, between 1845 and 1851, fulfil it at all. Unless, during that interval, Mr. M'Mahon was weighmaster, under the statute of *Anne*, there was a continuous illegality existing in Clones, and penalties of 40s. a-month accumulating against Sir Thomas Lennard. Well, it is beyond all dispute upon the evidence that, for the whole of that time, as a matter of fact, Mr. M'Mahon did the public weighing of the market of Clones, which, after the passing of the statute of *Anne*, no one but a weighmaster, under that statute, could legally do. Here then is a complete *prima facie* proof of appointment. But the defendants insist that this proof is annulled, by the fact that the fees taken by the plaintiff for weighing were not the statutable fees, but considerably in excess of them. He cannot, after that (it was said), be allowed to aver that he was weighmaster under the statute, because that would be to impute to himself illegal conduct; or, as the Counsel for the defendants seemed to take a pleasure in putting it, extortion, cheating, taking money under false pretences, for which he might be placed in a criminal dock. Some other origin for the plaintiff's acting must therefore be sought; and,

it is said to be found in this, that the weighmastership of Clones was a manorial office, resting on usages, and not the statutable office at all.

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Well, that was undoubtedly an exceedingly strong topic to be pressed, as doubtless it was, upon the jury. But its value was to weaken in their eyes, possibly to invalidate, the evidence from acting, not to annul or efface that evidence, so as to oblige the Judge to withdraw the question from the jury. There always remains the undoubted proof of acting,—that is, doing the very acts which a statutable weighmaster would do, and which, by law, such a one alone ought to do. No doubt the proof from acting was not as complete as it would have been if the statutable fees only had been taken. But it was for the jury to say what the effect was of those fees having been exceeded. Would they, in order to clear the plaintiff of the illegality of taking excessive fees, impute to Sir Thomas Lennard and the plaintiff another illegality, viz., to the former, that of not appointing an officer under the statute (as, whatever his own private rights were, he was clearly bound to do); to the latter, that of usurping the functions of that legal officer? Or would they, on the other hand, in order to clear Sir T. Lennard and the plaintiff from this latter illegality, prefer concluding that the office had been filled in the person of the plaintiff, but that he had taken larger fees than the statute entitled him to? That was an alternative plainly open to the jury, and upon which it would be utterly impossible for the Judge to assume to direct them. What occurred in the former case of *M'Mahon v. Lennard* strongly illustrates that. In that case, as in this, the plaintiff relied on acting, as proof of appointment: but he gave in evidence letters of one of the defendants, containing passages which denied an appointment; and the Judges who were consulted in the House of Lords thought that by so doing he had disabled his proof founded on acting, and that consequently the Judge at the trial ought to have withdrawn the case from the jury. But the House of Lords rejected that opinion of the Judges, and held that it was for the jury to consider all the evidence together, and that the Judge did perfectly right in leaving it to them.

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Hitherto I have assumed that the receipts of these larger fees could not be reconciled with the duties of a weighmaster acting under the statute. But if that assumption be unfounded, the whole foundation of the defendant's reasoning gives way. Let us see then how that is.—There was abundant evidence that, by the usage and custom of Clones, the larger scale of fees for weighing was, as far back as living memory went, claimed by, and paid to, the lords of the manor of St. Tierney. They were the fees scheduled on the old toll-boards, which Dr. Brady deposed to, and which were received by the three generations of the M'Mahon family. Indeed the defendant's contention was, that they were fees incident to an ancient manorial office. Now, take it so. When the statute of *Anne* was passed, it did not take away from the lord of the manor his right to those ancient fees for weighing; but it plainly imposed upon him, for reasons of public utility, the duty of appointing a sworn weighmaster under that statute. That weighmaster, when appointed, would be an independent freehold officer; he alone could thenceforth legally weigh in the market, and he would be entitled to the fees provided for him by the statute. But it would be manifestly unjust that the public should be doubly taxed for weighing,—that is to say, should still pay the old fees to the lord, and the new ones also to the weighmaster: the fair adjustment would manifestly be, that the weighmaster's fees should come out of the lord's, and the latter be entitled to the surplus. Now, from that state of rights, what one would anticipate *a priori* to inevitably take place would be this, that when the lord appointed the weighmaster under the statute, he would depute the same person to receive the whole customary fees payable by the public, out of which he (the weighmaster) would retain his own statutable fees, and account to the lord for the surplus; or else, that he would farm that surplus at a rent, and, paying that rent, retain the whole fees for himself. Now that is a theory which, if founded on fact, would completely reconcile M'Mahon's receipt of the large fees with his appointment to the office whose duties he was performing. Well, was there no evidence of that? It is proved by Mr. Ellis himself that the plaintiff paid Sir Thomas

Lennard £40 a-year for the crane, which, as Ellis's letter of the 11th of February 1846, given in evidence by the defendants, shows, meant the profits of the weighing; and the receipts for this rent, together with those of other holdings, down to May 1848, were proved. Then the following facts were in proof, or at all events there was evidence of them for the jury:—First, Sir T. Lennard was owner of tolls and customs in Clones. Secondly, those tolls and customs consisted in part of ancient fees for weighing in the market. Thirdly, Sir T. Lennard being thus fixed with the duty to appoint and swear some one under the statute of *Anne*; M'Mahon alone is found, from 1845 to 1851, openly acting in the duties which such officer, if appointed, would have to perform. Fourthly, the circumstance, that the fees which he took were larger than those allowed by the statute, is accounted for by the fact that the lord's customary fees for weighing were those larger amounts; and that M'Mahon had farmed that surplus from him at a rent. In other words, there is the same proof of acting which the House of Lords have already decided to be sufficient proof of appointment; and the circumstance, at first view inconsistent, by which that proof was said to be annulled, is brought into complete reconciliation with it.

I have as yet said nothing as to the documentary evidence; but it unquestionably furnishes corroboration on both the points I have been considering, namely, the existence of tolls and customs, and the appointment of the plaintiff. Mr. Ellis's letter of 29th of August 1847 contains the most emphatic recognition that the plaintiff was then in some way or other rightful weighmaster of Clones. But there was only one way in which he could be rightly so by law, and that was by appointment under the statute of *Anne*. M'Mahon, in his letter of the 20th of July 1848, distinctly asserts his title to a statutable freehold office. It was said, and probably truly said, that, although he refers to a statute of *Anne*, the context shows he meant not the general Weighmasters Act of *Anne*, but the Butter Act of that reign. But that is really of little consequence. The material thing is, that he asserted a statutable title to the office he was then exercising—that is, as weighmaster of *all*

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commodities, not of butter only; and the only statute in existence which could give title to such an office was the statute of 4 *Anne*, c. 14. Now, to that letter no reply was ever given. It was not said the office cannot exist in Clones at all, because there are no tolls and customs there, or, if it could exist, you were never appointed to it: it was quite a different office that you have been performing the duties of. Leaving that letter unanswered, is certainly corroborative evidence that the source to which the plaintiff now refers his acting is the true one.

We are therefore of opinion that there was evidence to go to the jury of the plaintiff's appointment; and that all the exceptions which were pointed at the second issue must be overruled.

The third of the three principal questions in the case is, that which is the subject of the third, fourth, and fifth issues—namely, whether there is evidence that the plaintiff took the oaths which by law he was bound to take, before acting in the office. By the statute 4 *Anne*, two oaths were directed to be taken—first, the oath of office, as prescribed by the Act itself, and which should be administered contemporaneously with the appointment, by the person appointing; secondly, the oath of abjuration, prescribed by the statute 3 *W. & M.*, c. 2; until after taking which, the statute of *Anne* enjoined the weighmaster not to act. In *M'Mahon v. Lennard* it was held, in the House of Lords, that the latter oath was dispensed with by the Roman Catholic Relief Act; but that, in lieu thereof, the plaintiff was bound to take the Roman Catholic oath, prescribed by that latter statute. The two oaths therefore, on which the present question turns, are the oath of office, under the statute of *Anne*, and the Roman Catholic oath, under 10 *G.* 4, c. 7.

With respect to the first of these oaths, we have nothing to do but to follow the decision in *M'Mahon v. Lennard*. In that case, as in this, the only evidence the plaintiff gave of the taking of that oath was his acting in the office. In that case, as in this, an exception was taken, because the Judge left the question to the jury on that evidence; and the House of Lords held that that exception was properly overruled. Acting was evidence of the oath, for precisely the same reason that it was evidence of the appointment;

that is, because both the one and the other were necessary to legalize the acting. No proof was given by the defendant in rebuttal of this presumption; and therefore, I repeat, we have nothing to do here but follow the House of Lords' decision, by overruling all the exceptions which are pointed to the oath of office.

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The same reasoning obviously applies to the exceptions which were taken at the close of the plaintiff's evidence, respecting the Roman Catholic oath; and therefore those exceptions also must be overruled. But different considerations are applicable to the exceptions which were taken on this point to the Judge's charge. The defendants went into evidence in rebuttal of the presumption from acting, on which exclusively the plaintiff rested his case; and their Counsel have now contended, that so conclusive was that evidence in rebuttal, that the Judge was bound to withdraw the presumption from the jury, and tell them that there was *no* evidence that the oath had been taken.

It is necessary here to refer to the 10 G. 4, c. 7. By the 10th section it was enacted that Roman Catholics might exercise all civil offices and rights, upon taking, "*at the times and in the manner therein after mentioned,*" the oath by that Act appointed, instead of the oath of abjuration, and the like. By the 19th section, the time and manner of taking the oath are appointed, with respect to corporate offices. By the 20th section, a different time and manner are appointed for offices under the Crown. But there is no section appointing any time and manner of taking the oath for an office like the present: and for that reason it was strongly argued, in the House of Lords, in *M'Mahon v. Lennard*, that the plaintiff was not within the protection of the 10th section; and was therefore bound to take the oath of abjuration under the statute of *W. & M.* The Lords held otherwise; but they expressly disclaimed deciding that the case fell within either the 19th or 20th section, as to the time and manner of taking the new oath. Lord Wensleydale said [6 *H. of L. Cas.*, p. 1010]:—"The oath ought to have been taken either within the month" (which is the time mentioned in the 19th section), "or within the three months"



T. T. 1863. (which is the time mentioned in the 20th section), "or on beginning to exercise the office,—*it is uncertain which* ; and the safer course would be, no doubt, to take the oath on beginning to act, "or one month before beginning, which would be good if the time "stated in the 21st section" (this is obviously a mistake for 20th section), "namely, three months, was the right one ; *but if the oath was not taken at all, the office becomes void.*" Lord Wensleydale therefore was plainly of opinion that observance of the time and manner mentioned in the 20th section was not essential ; but that, if the oath was taken in conformity with the 19th section, or with neither section, but was taken on beginning to exercise the office, the Act was complied with ; and that it was only if the oath was not taken at all that the office became void. Now the defendant's whole evidence by way of rebuttal proceeded upon the assumption that the plaintiff was bound to pursue the manner prescribed by the 20th section ; and that consequently, if the oath was not found recorded in any of the depositories pointed out by that section, the presumption from acting was altogether repelled. His proof therefore consisted of searches made, without effect, in certain of those depositories. But his argument fails, in my opinion, for these reasons:—First, upon the ground just mentioned, I think compliance with the 20th section was not necessary in the plaintiff's case at all ; and that therefore, even if it were conceded that no oath by him was recorded in any one of the depositories mentioned in that section, nevertheless if it was in fact taken before any of the Courts there mentioned, or before any of the magistrates mentioned in the 19th section, or before *anyone* having authority to administer an oath, the oath would be sufficiently taken, though recorded nowhere : secondly, I think that, even if the case came under the 20th section, the neglect of the officer of the Court to record the oath (for it is on him expressly the Act throws the duty of doing so) would not destroy the efficacy of the oath, if in fact taken by the party. These two reasons show that, even if the search had been perfectly exhaustive, the presumption from acting would be left intact. But, thirdly, the search proved was insufficient. The oath might, under the 20th section,

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be taken in the Court of Chancery, in any of the three Superior Courts of Law, before any Judge of Assize, or at the Quarter Sessions of the borough or place where the party resided. Of the evidence of search given, it is enough to say, that no sufficient search was, in my opinion, made in the Court of Chancery; that no search at all was proved among the records of any Court of Assize; and that, though a search was proved among the records of the Courts of General or Quarter Sessions for the counties of Dublin and Monaghan, no evidence was given that the plaintiff resided in either of those counties. The search was obviously but a partial one. No doubt it was some evidence, so far as it went, towards a rebuttal of the presumption on which the plaintiff had relied; but I have heard no authority for the proposition that the effect of such evidence is to wipe out the proof by acting, so as to oblige the Judge to tell the jury that the plaintiff has no evidence. I am of opinion that the Judge's duty, in such a case, is to leave the evidence at both sides together to the jury; and, so, in like manner, the fact that the plaintiff, who knew best whether he ever took the oath, did not come forward as a witness to prove it, was a very strong and persuasive topic for the jury, but obviously for them only. The learned Judge distinctly told the jury that before they could find for the plaintiff, they must be satisfied that the oath was actually taken; and with that direction he left the evidence on both sides to them, and they thought fit to find that the oath *was* taken. I must say, I would not have concurred in that verdict. I myself believe that it is contrary to the truth and the fact; and if, instead of this mass of aimless exceptions, the defendants had gone straight at the weak point of their adversary's case, by moving to set aside the verdict as being against the weight of evidence, the plaintiff would have serious difficulty in maintaining his verdict, upon this point of the Roman Catholic oath. That course however they did not think proper to take, and consequently, whatever we may think as to the correctness of the verdict on the point, we cannot do otherwise than overrule these exceptions.

The exceptions which are ruled by what I have said hitherto

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are the first five of the first set ; and from the seventh to the tenth, both inclusive, and the sixteenth, seventeenth, and eighteenth of the same set ; also the corresponding or duplicate exceptions to all these, in the second set. There still remain some exceptions applicable to the first count, which call for separate remark.

By the sixth exception (in each set), the Judge was required to direct the jury—that is to say, that as one standard for measuring damages was wanting, therefore the jury must give no damages. That is obviously untenable : besides, it is founded on a mistake. The legal fees are pointed out by the statute, and are the measure of damages ; though more was received. These two exceptions must therefore be overruled.

By the eleventh exception, the CHIEF JUSTICE was required to direct the jury to find for the defendants on the seventh and eighth issues ; because the alleged acts of the defendants could not be legally construed as a disturbance of the plaintiff in the office. But the seventh and eighth issues raised questions purely of fact,—were the acts committed, and what was their legal efficacy ? The eleventh of the second set is a repetition of the former, applied only to the eighth issue, the seventh having been found in favor of the defendants. The same observation applies to it ; and this pair of exceptions must also be overruled.

The twelfth exception in each set called on the CHIEF JUSTICE to direct a verdict for the defendants on the Statute of Limitations as applied to the first count, that is to say, on the nineteenth issue as applied to that count. That issue was, whether the supposed causes of action, in the introductory part of the ninth plea to the first count mentioned, accrued to the plaintiff within six years before the commencement of the action. Now the ninth plea is exceedingly absurd in its form. It is, that as to so much of the first count as claims damages for supposed wrongs alleged to have been committed prior to six years before the commencement of the action, defendants say, that the said supposed causes of action, in the introductory part of this plea mentioned, did not accrue within six years before the commencement of the action. Well,

that is a truism, and the issue taken on it was this literally, whether the causes of action which accrued more than six years ago, ~~did~~ accrue more than six years ago. The plea and issue in this form obviously invoked an admission of the causes of action laid in the plaint, as having accrued within the last six years. The CHIEF JUSTICE made sense of it in the only way possible, by leaving it to the jury to say whether any of the causes of action accrued within six years, and, if so, to give damages only for those. This exception must of course show the fate of the rest.

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Of the seventeenth and eighteenth of the second set of exceptions, it is enough to say that there is no issue to which they are relevant. I took occasion to observe early that the general averment of disturbance was not traversed. Two averments of particular acts of disturbance were traversed, and of those, one was found for the plaintiff, and the other for the defendants. The result was that, supposing the plaintiff to succeed in establishing his tenure of the office, the general averment of disturbance was admitted on the record, and one of those special averments was found in his favor. But whether those averments, or either of them, were or was, in law, sufficient to maintain the action, is a question which could not be entertained by the Judge at the trial, and could not therefore be a proper subject for an exception. I give no opinion upon it. Those exceptions must be overruled for irrelevancy.

I have now disposed of all the exceptions which are applicable to the cause of action put forward in the first count. I have now to consider those which are appropriate to the second count. Of the issues which grew out of this count and its attendant pleadings, three only need be mentioned. The others were disposed of, either by being found for the defendants, or withdrawn from the jury. The three were the second, third, and sixth. Of these the second was, whether the tenancy from year to year in one room in the market-house, found by the jury in the action in 1851 to be then existing, was a subsisting tenancy at the time

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of the commencement of *this* action. The third was, whether the defendants committed the supposed trespasses, wrongs, or grievances, for which damages are sought by this second count. The sixth was the Statute of Limitations. These three plain and simple issues were what the Judge and jury had to try. The exceptions appropriated to these are the thirteenth, fourteenth, and fifteenth of each set. By the thirteenth it was insisted "that the CHIEF JUSTICE should direct a verdict for the defendants on the second issue on the second count," for several reasons stated in the exceptions, one of which was, "because there is no evidence to sustain the allegation of a continuing tenancy." Now, the second issue was, as I have said, simply whether the tenancy from year to year was subsisting. Therefore the only part of the thirteenth exception which had any application to that issue was, the assertion that there was no evidence to sustain the allegation of a continuing tenancy. All the rest about trespass to real property, being a possessory action, and so on, was mere irrelevancy. Well, then the question on this exception is, was there any evidence to sustain the allegation of a continuing tenancy? The evidence was, a verdict, and a judgment founded on it, establishing that the tenancy existed in 1851, from which the law presumes that it continued till something was shown to determine it. Well, we are all familiar with the means by which tenancies from year to year can be determined—surrender, actual or by operation of law, or notice to quit. Nothing of the kind was proved in this case. But the Judge was called on to tell the jury that, because the defendants took forcible and illegal possession on the 12th of June 1851, and held it ever since, that, for that reason alone, the tenancy had ceased to subsist. And he was called on to do this as an absolute conclusion of law, on which he must direct a verdict, not even as a matter to be left to the jury, on which they *might* presume a surrender or abandonment of the tenancy. To state the proposition is to refute it. A case of *Leigh v. Thornton* (a) was referred to, but it is wholly without resemblance to the present. It was

(a) 1 B. & AL 625.

an action for use and occupation. The defendant had been at one time in occupation as tenant from year to year, having succeeded as personal representative of a former tenant. But more than six years before action brought he had gone out of possession, and a person named Ruby had come in and paid the rent from that time. The defendant was never in occupation at any time within the six years. The Court held he was not liable in use and occupation; and the true ground of the decision is stated by Holroyd, J., namely, that the evidence showed that the occupation was in Ruby and not in the defendant. But, even in that clear case, Lord Ellenborough said that he would himself probably have left the case to the jury, though with a strong direction to find for the defendant. But, in the present case, instead of any third person having come into M'Mahon's stores, and paid the rent for more than six years, the landlord himself illegally intruded on the possession, and has since illegally held it. It is plain that this does not constitute *in law* (for that is the proposition) a determination of the tenancy; and therefore the thirteenth exception must be overruled.

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The fourteenth exception called for a direction on the third issue on the second count, for reasons therein stated. Here again the issue is totally lost sight of. The issue was simply whether the defendants committed the grievances for which damages are sought by the second count. Now, what were those grievances I read from the second count.

The question on the issue was simply whether these things happened in fact; in other words, whether, as a matter of fact, the plaintiff was kept out of possession since 1851. If he was, the issue must be found for the plaintiff. Well, no one denies, in fact the fourteenth exception itself asserts, that he was, and absurdly insists that, for that very reason, a verdict should be directed for the defendants on this issue.

The fifteenth exception relates to the issue taken on the plea of the Statute of Limitations, so far as it regards the second count. What I have said on that plea, as applied to the first

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count, is equally applicable here, and therefore I need not repeat it. This exhausts all the exceptions relating to the second count. This latter class of exceptions, even more than the former, displays that want of apprehension of the ordinary business of a trial at Nisi Prius by which the defendants have been led astray. Exception after exception was taken, and hour after hour wasted in argument, under the notion that the province and function of a Judge at Nisi Prius is to entertain and adjudicate upon the whole merits of the case, both at law and in fact, instead of confining himself strictly to the issues which were sent to him to try.

The result of the whole is, that we, who heard the argument, are unanimously of opinion, that all the exceptions must be overruled.

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Exchequer.

## COLCLOUGH v. COLCLOUGH.\*

(Exchequer.)

April 30.  
 May 2, 7.

THIS was an application by the plaintiff Patrick Sarsfield Colclough, to set aside an order obtained by the defendant J. T. Russborough Colclough, under the 106th section of the Common Law Procedure Act 1853, and to obtain leave to proceed to trial at the ensuing Assizes.

The facts of the case are fully stated in the judgment of the Court.

Serjeant *Sullivan* (with whom was *J. O'Hagan*), for the plaintiff, cited: *Doe d. Ringer v. Blois* (a); *Greenhill v. Mitchell* (b); *Richards v. Harner* (c); *Pickup v. Wharton* (d); *Webber v. Roe* (e).

*A. Brewster, J. E. Walsh, and W. Ryan*, for the defendant, cited: *Law and Belcher v. Bott* (f); *Horner v. Spencer* (g); *Norris v. Lawder* (h).

*J. O'Hagan*, in reply, cited: 2 *Chitty's Archbold Prac.*, p. 1492; *Doe d. Warren v. Bridges* (i).

*Cur. ad vult.*

FITZGERALD, B., now delivered the judgment of the Court.

May 7.

The action in this case, which is an ejectment brought to recover

(a) 8 Dowl. 18.

(b) 6 Taunt. 150.

(c) 5 Com. B. 582.

(d) 2 Dowl. 388.

(e) 3 Dowl. 589.

(f) 16 M. & W. 362.

(g) 1 Fost. & Fin. 412.

(h) 8 Ir. Com. Law Rep., App., 47.

(i) 11 Jur. 230.

\* *Coram* PIGOT, C. B., FITZGERALD and HUGHES, JJ.

The 106th section of the Common Law Procedure Act 1853, does not preclude the Court from looking at the circumstances under which a plaintiff withdrew the record at the Assizes, indicated by the first Rule mentioned in that section.—[HUGHES, B., *dissentiente*].

Circumstances under which extension of time was granted to a plaintiff.



E. T. 1864. possession of certain lands in the county of Wexford, was commenced  
*Exchequer.* in the month of June 1862? The plaintiffs are an insolvent and his  
COLCLOUGH v. two assignees. The assignees do not appear to have agreed as to the  
COLCLOUGH. prudence of instituting the suit; one of them, Mr. Fitzpatrick, has  
taken an active part in its prosecution; the other, Mr. James, has  
thrown some impediments in the way, with a view to his own secu-  
rity against costs in the event of failure. At the defendant's instance,  
and under an order made in July 1862, a sum of £100 was paid into  
Court, on the part of the plaintiffs, as security for costs. The  
defence was filed in Michaelmas Term 1862. The earliest possible  
trial would have been at the Spring Assizes of 1863, and notice of  
trial for those Assizes was served in the month of February 1863.  
On the 20th of February 1863 an order of the Insolvent Court, to  
which the defendant was no party, was obtained by Mr. James, re-  
straining the proceeding on that notice of trial, unless the sum of  
£400 was actually paid on the 21st, as a security against costs. The  
money was not so paid, and the trial was not proceeded with.  
Having regard to the period at which the application was made,  
the amount called for, and the time limited for the payment of the  
money, I cannot say that there was any wilful default, on the acting  
plaintiff's part, in not then proceeding to trial. The next possible  
trial would have been at the Summer Assizes of 1863. It appears  
however that, on the 16th of June 1863, Mr. James had obtained a  
further order of the Insolvent Court, increasing the sum to be lodged  
as a security against costs, to £750. Notwithstanding this further  
order, and without payment of the money, notice of trial for the  
Summer Assizes was served on the 24th of June 1863. But on the  
29th of June 1863, the Insolvent Court made an order for the pay-  
ment, within one month, of the £750; and that in default of payment  
Mr. Fitzpatrick should be removed as assignee. From this order  
there was an appeal to the Court of Appeal in Chancery; and I  
still find myself unable to say that there was, under these circum-  
stances, any wilful default in not proceeding to trial at the Summer  
Assizes of 1863. I speak of wilful default; for no doubt, as respects  
the defendant, the delay was, in a sense, default. Trinity Term  
1863 having passed, the defendant, on the 6th of July 1863, and

after the making of the orders already stated, entered, as he was entitled to do, a rule, under the 106th section of the Common Law Procedure Act, that the plaintiffs should proceed to trial at the Assizes next after the expiration of twenty days from the service of the rule, and that in default the defendant should be dismissed, with his costs of suit. That rule was duly served; and the Assizes to which it would apply would be the Spring Assizes of 1864. Previous to those Assizes no application was made by the plaintiffs to extend the time for proceeding to trial, save as after mentioned.

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On the 27th of November 1863 the Court of Appeal in Chancery made an order extending the time for lodging the £750, until the 1st of February 1864. On the 30th of January 1864 the £750 was paid; and on the 20th of the same February notice of trial for the then coming Spring Assizes was served. On the 26th of February 1864 the plaintiffs served notice of a motion that the defendant might be restrained from setting up outstanding terms at the trial, or that the time for proceeding to trial might be extended; and on the debate of this motion, the defendant's Counsel consented to waive outstanding terms; and no rule was made on the alternative part of the notice.

On the 4th of March 1864, the case being called on at the Assizes, a motion was made before the Judge of Assize, by the plaintiffs, to postpone the trial until the next Assizes, on the ground of a discovery then made, that a witness summoned from England, and who had but just arrived in Wexford, denied having the possession of certain documents material to the plaintiffs' case, to produce which she had been served with a *subpœna duces tecum*; and which up to that moment it had been believed were in her possession. Upon the affidavits filed for the purpose of that motion, the learned Judge refused to postpone the trial; and the plaintiffs then, under the advice of their Counsel, withdrew the record. On the next day, the 5th of March, the plaintiffs served a notice, substantially as it appears to me, intimating an intention to apply to this Court for an extension of the time for proceeding to trial. It was not properly a notice of motion. It intimated the belief of the

E. T. 1864. plaintiff's attorney that an application to a Judge in Chamber  
*Eschequer.* could, under the circumstances, be attended with no result; and  
 COLCLOUGH required to know whether the defendant's attorney did not acquiesce  
*v.*  
 COLCLOUGH. in this view, and would not prefer an application to the Court *in banc*, in the next Term. To this notice the defendant gave no answer; but on the 7th of March 1864, entered a peremptory order for the payment of his costs of suit under the 106th section of the Common Law Procedure Act; and which order, that Act provides, "shall be in lieu, and shall have the effect, of a judgment as in case of nonsuit."

The object of the present application is, to be relieved from the effect of that order, and to have time until the next Assizes for proceeding to trial.

The 106th section of the Common Law Procedure Act is in these words:—"The plaintiff shall proceed to trial within three Terms from that in which, or the Vacation of which, the defence or other subsequent pleading is filed; and in default thereof, the defendant may enter a rule that the plaintiff do proceed to trial at the Assizes or Sittings next after the expiration of twenty days from the service of such rule; and that in default the defendant shall be dismissed with his costs of the suit; and if the plaintiff neglects to proceed to trial in pursuance thereof, the defendants, on filing an affidavit of the service of such rule, and that the plaintiff has failed to proceed to trial in pursuance thereof, may enter a peremptory order for the payment of his costs of the suit, which order shall be in lieu, and shall have the effect of a judgment, as in case of a nonsuit; and the defendant producing such order shall have the pleadings in the cause removed into the office of the Master of the Court, for the purpose of having execution thereon, and shall have execution accordingly; provided however that the Court or a Judge shall have power to extend the time for proceeding to trial, with or without terms."

A somewhat similar provision is contained in the 101st section

of 15 & 16 *Vic.*, c. 76 (the English Common Law Procedure Act). E. T. 1864.  
 The order of the 7th of March 1864 appears to me to have Eschequer.  
 been properly obtained; and the defendant ought not, except on COLCLOUGH  
 sufficient grounds, to be deprived of the benefit of it. The effect v.  
 given to the order by the Irish Act is that of judgment as in case COLCLOUGH.  
 of nonsuit, and the order stands in the place of *such* judgment.

The judgment as in case of nonsuit was a statutable judgment under the 2nd section (now repealed) of an Irish Act, 28 *G.* 3, c. 31, which corresponds with the 1st and 3rd sections of the English Act, 14 *G.* 2, c. 17.

The Irish Act provided:—"That, where any issue is or shall  
 "be joined in any action or suit at law in any of his Majesty's  
 "Courts of Record, and the plaintiff or plaintiffs shall neglect to  
 "bring such issue to be tried according to the course of such Courts  
 "respectively, it shall be lawful for the Judges of the said Courts  
 "respectively, upon *motion made in open Court* by the defendants  
 "in such action, or one of them, if there be more than one, *due*  
 "*notice having been given thereof*, to give the like judgment and  
 "award costs in every such action or suit, as in cases of nonsuit;  
 "unless the said Court shall upon just cause and reasonable terms  
 "allow any further time or times for the trial of such issue;  
 "and, if the plaintiff or plaintiffs shall neglect to try such issue  
 "within the time so allowed, then the Court shall proceed to give  
 "judgment and award costs to such defendant as in case of a  
 "nonsuit."

This section of the Irish Act comprehends in substance the provisions of the 1st and 3rd sections of the English Act.

The 2nd section of the English Act provides that all judgments, given by virtue of this Act, shall be of the like force and effect as judgments upon nonsuit, and of no other force and effect.

In this section I do not find any provision in terms corresponding in the Irish Act; but it does not seem to make any real difference.

Under these Acts, the practice in both countries appears to have been that, after the lapse of the time from issue joined mentioned

E. T. 1864. without a trial, the defendant was, on his application, entitled to  
Eschequer. a conditional order for judgment as in case of nonsuit.  
 COLCLOUGH v. The plaintiff might show cause, and slight cause was deemed  
 COLCLOUGH. sufficient, and, in general, upon the terms of a peremptory under-  
 taking, to go to trial at some fixed period, the conditional order  
 was discharged.

If the plaintiff failed to proceed to trial pursuant to his under-  
 taking, it was still necessary for the defendant to obtain an order  
 upon notice for judgment as in case of nonsuit, and the plaintiff  
 had an opportunity of showing a substantial compliance with the  
 undertaking, or an excuse for his noncompliance. In such case  
 however the cause shown was much more strictly canvassed : *Battie*  
*v. Brown (a)*.

It would not probably be easy to find many instances of a judg-  
 ment as in case of nonsuit, actually entered under the statute,  
 being set aside ; because it could not have been entered, even  
 after a conditional rule once discharged, and failure of the peremp-  
 tory undertaking, without a motion or notice giving the plaintiff  
 an opportunity of excusing his default : *Jackson v. Carrington (b)*  
 however is such a case ; and in *Hutchinson v. Hutchinson (c)*, soon  
 after order for judgment, as in case of the said discharge, on a  
 peremptory undertaking, the plaintiff failed, and the defendant  
 actually obtained an absolute order for judgment as in case of  
 nonsuit ; that order was set aside, an affidavit stating that the  
 reason for not proceeding to trial was the absence of a material  
 witness, caused by illness.

It will be remembered that a nonsuit at common law could  
 never have been but by the voluntary act of the plaintiff ; and  
 yet, even in such cases, the Courts have set aside the nonsuit ;  
 and an instance in which the defendant had taken down the  
 case by proviso will be found in *Brown v. Otley (d)*, and in  
 which the plaintiff declined to appear at all, insisting that the  
 case should be tried on *his* record, which he had also brought

(a) Sayer, 74.

(c) 9 Price, 389.

(b) 4 Exch. 41.

(d) 1 B. & Ald. 253.

down, and not of that of the defendant, though the Court held him to be wrong in his contention, and the nonsuit to be right.

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The 106th section of the Common Law Procedure Act makes no provision for notice to the plaintiff, after default of compliance with the first rule, before the order for payment of costs is made, and which is to have the effect of judgment as in case of nonsuit. The order may follow immediately on the failure, and an affidavit of service of the said rule and the failure.

But, on the whole, having regard to the practice in the cases of judgment as in case of nonsuit, I cannot think it was the intention of the Legislature that nothing which occurred at the Assizes, indicated by the first rule, could form an excuse for the withdrawal of the record.

If perhaps it should be thought that notice of application for relief should be given before the order for payment of costs has been obtained, still I should be disposed to say that, in this case the notice of the 5th of March was substantially a notice that such application was intended; nor am I prepared to say that, even if there had been no such notice, the plaintiff would be precluded from relief.

In the case of *Dowell v. Hussey* (a), in which relief against the order regularly entered was refused as sought for on insufficient grounds, the mere *laches* of the plaintiff's attorney, the Court appears distinctly to intimate that surprise or fatality would be a sufficient ground of relief; and Mr. Justice Crampton stated that, even in that case, which was, as here, an ejectment, if the Statute of Limitations would have applied, on the refusal of relief, that excuse might have been available.

I proceed then to consider the excuses relied on here.

The defendant is in possession of the estates, the subject of the ejectment, and which are of great value, claiming to be entitled to them in right of his wife as heiress-at-law of one Cæsar Colclough, who died in the year 1842.

The plaintiff claims, or at least one claim of the plaintiff Patrick

(a) 6 Ir. Com. Law Rep. 230.

E. T. 1864. Colclough is, as heir-at-law of the same Cæsar Colclough; and his right as such, or rather of his father, through whom he claims, must have occurred in the year 1842, if at all.

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COLCLOUGH. If this judgment of nonsuit, in the present ejectment, should stand, he will effectually be deprived of any remedy, if to any he is entitled.

The defendant's wife is the daughter of another Cæsar Colclough, who died in the year 1822, and whom the defendants allege to have been the eldest son of one Adam Colclough, who is said to have died about the year 1794.

The plaintiff Patrick is the eldest son of one Sarsfield Colclough; and he alleges that Sarsfield Colclough his father was in truth the eldest son of that Adam Colclough.

His allegation is, that two elder sons of Adam, viz., the before-mentioned Cæsar and Dudley, were born before Adam's marriage with the mother, a Miss Byrne; and that consequently both of them were illegitimate.

He further alleges that an important part of his evidence to establish that case consists of a correspondence between the Byrne and Colclough families, which, up to the time of the last Wexford Assizes, he believed, and had reason to believe, was in the possession of a Miss Byrne resident in London.

Miss Byrne had previously to the Assizes declined to communicate with his attorney, or, as the plaintiff Patrick alleges, with his daughter, whom he had sent to London for the purpose; and though she had an interview with the plaintiff Fitzpatrick, yet, as Fitzpatrick swears, she left him under the impression that she had the correspondence required.

Miss Byrne was served with a *subpoena duces tecum*, for the last Wexford Assizes; and, on her arrival there, in the month of March last, had an interview with the plaintiff's attorney, on which she informed him that she had not, and did not know of, the correspondence sought for.

It is alleged by Patrick Colclough, Fitzpatrick, and the attorney, that they and the Counsel were wholly taken by surprise by this

intimation, and that, in the absence of this evidence, in reliance on obtaining which they had gone down to trial, they were advised by the Counsel, of whom two had been taken down specially, they ought to withdraw the record; which was withdrawn accordingly, after an unsuccessful attempt to have the trial postponed.

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These matters are relied on as constituting a reasonable excuse for the withdrawal of the record; and the Court has been further pressed with the consideration of the large sum of money actually lodged as a security against costs; with the large expenditure otherwise made in the cause, and particularly the taking down of two special Counsel; and further, with the consideration that, by reason of the attaching of the Statute of Limitations on the plaintiff's claim, the damage done by allowing the nonsuit to stand will be irreparable.

No other depository of the supposed correspondence is suggested than Miss Byrne; but it is alleged that though, for the purpose of this motion, she has made an affidavit for the defendant, she does not distinctly deny possession of it.

There is an affidavit to the merits of the plaintiff's case, and of *bona fide* intention to have it tried.

If credit can be given to those affidavits filed on the part of the plaintiffs, there is a question to be tried between the parties; there is a *bona fide* intention of trying it; there has been a large advance of money on their behalf, with the view of having it tried; there was a sudden surprise, in the absence, at the last moment, of expected evidence, which, though it might not be absolutely necessary, was material; and, above all, the consequence of failure in this motion will be to bar the plaintiff's claim, and without any appeal from our decision.

A number of matters, entitled, in my opinion, to great weight, have been urged, on the part of the defendant, with the view of showing that there is no *bona fide* question of legitimacy to be tried at all; that there is not, and never was, any *bona fide* intention of having the supposed question tried; that the money expended is certainly not that of the insolvent plaintiff or of Fitzpatrick, and



E. T. 1864. Eschequer.  
COLCLOUGH v. COLCLOUGH. has been probably obtained, as a speculation, by misrepresentations; that the plaintiff knew well, before the Assizes, that Miss Byrne had denied possession or knowledge of the alleged correspondence; and that, as to the Statute of Limitations, its attaching would be the consequence of his own *laches*, in the institution of the suit after the death of his father Sarsfield, who himself was so far from denying the legitimacy of his brother Cæsar, that he had proved it for the defendant, in the protracted litigation by means of which he and his wife received the estates.

I do not intend to enter into a particular consideration of these matters. I confess, if the question was, whether I am satisfied, beyond any reasonable doubt, of the *bona fide* existence of a question as to legitimacy; of a *bona fide* intention of trying such question, with any hope of success; or of a *bona fide* belief in the existence, and possession by Miss Byrne, of the correspondence alleged, I am far from being able to say that I am so satisfied. But I cannot bring myself to doubt that the professional advisers of the plaintiffs, at the Assizes of Wexford, were taken by surprise by the absence of the expected evidence, and did *bona fide*, on that ground, direct the withdrawal of the record; and that being so, unless I was, on the other hand, satisfied beyond any reasonable doubt of the want on the plaintiff's part of that *bona fides* which has been deposed to, I cannot bring myself, at the risk of depriving the plaintiff of any remedy, and so depriving him without the possibility of appeal, and after the unquestionable large advances of money already made, to refuse giving them one more opportunity of having the alleged question tried, on the only terms on which it seems to me they can have it—viz., paying, as a condition precedent, the costs of the nonsuit, which will necessarily, I apprehend, amount to a further considerable sum.

In the case of *Martin v. Milner* (a), after rule for judgment as in case of nonsuit discharged, and a peremptory undertaking given, failure was excused, on the ground that the case was a special jury case, and that only one special jury-man appeared when the case

(a) 1 Bing. 70.

was called on; though the record was not withdrawn until after a *tales* had been prayed, and some talesmen actually sworn: and I have already referred to a case in which a voluntary nonsuit was set aside on the ground, as would appear, of mere misapprehension on the part of the plaintiff.

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I am not insensible of the hardship of this case as regards the defendant, who has been in no default, and whose expenses have been sworn to have been very large; but I cannot assist to risk the doing of irreparable damage, by refusing an extension of time until the next Assizes, on the terms I have mentioned. I think also the plaintiffs must pay the costs of this motion.

HUGHES, B.

I differ entirely from my Brethren. I think this motion should be refused. My opinion is formed from the mode in which the plaintiff's case has been managed, the acts of the plaintiff, and the class of evidence which the plaintiff contends he can give. I will not go into those grounds more particularly, as my doing so might prejudice the fair trial of the action.

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Common Pleas

## HASTINGS v. LOWER BANN NAVIGATION TRUSTEES.

April, 29, 30.  
May 2.

(Common Pleas).

By the 19 and 20 *Vic.*, c. 62, the Lower Bann Navigation Trustees were incorporated for the purpose of the maintenance and conservancy of the Lower Bann Navigation, which was vested in them; and they were empowered to make bye-laws for the well and orderly using and preserving the said navigation; and to enforce penalties against any persons who should throw or deposit any ballast, &c., so as to interrupt or obstruct the free passage of water or vessels into, through, or in the said navigation, or do any other damage thereto. The plaintiff, alleging that he was entitled to the exclusive right of fishing for eels in a portion of said navigation, complained that the defendants neglected to conserve the navigation, and that the channel and navigation had been used by poachers, &c., for unlawful purposes, and had been unlawfully obstructed, and injury thereby done to his fishermen and fishing implements, &c., for which he claimed damages, and a writ of *mandamus* to the trustees to remove the obstructions, and to conserve the navigation in a sufficient manner.—*Held*, upon demurrer, that the summons and plaint disclosed no sufficient cause of action, nor any ground for a writ of *mandamus* in a civil action.

This was an action against the Trustees of the Lower Bann Navigation, incorporated by the 19 & 20 *Vic.*, c. 62. The summons and plaint, after stating certain of the provisions of the 18 & 19 *Vic.*, c. 110, and the first named Act, alleged that the latter contained certain provisions for vesting in said Trustees the said Lower Bann Navigation, together with all locks, weirs, and other works, &c., for the use of the counties, baronies and townlands chargeable under the award of the Commissioners of Public Works; and that same should be held, maintained and preserved by such trustees, subject to the provisions contained in the Act now in recital; also provisions for enabling the trustees, from time to time, to make bye-laws for regulating the conduct and management of their business, and the conduct of all officers, workmen and servants employed by them, and for the well and orderly using and preserving the navigation, and the off-branches, and the banks, basins, &c., and all other works thereto belonging; and for regulating the passing and re-passing of all ships and boats, &c., and the carrying of all goods, &c.; and for the orderly behaviour of all seamen, boatmen, &c., who should navigate such ships, &c., and for the superintendence, &c., of the said navigation; and to impose fines and penalties upon all persons offending against any of such bye-laws: and the trustees were authorised and empowered to prosecute to conviction, and to enforce penalties against any per-

sons who should throw any ballast, gravel, &c., so as to interrupt or obstruct the free passage of water or vessels into, through, or in such navigation, or do any other damage thereto.

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v.

The summons and plaint having averred the opening of said navigation from Lough Neagh to Coleraine, alleged that the plaintiff was entitled to all the eel fishery, and exclusive right of fishing for and taking eels in, over, and through that part of the Lower Bann River between the bridge of Coleraine and Lough Neagh, which runs, flows and extends from the eel weirs next above and to the south of the new cut into the Salmon-leap at Coleraine; and which, according to the course of the said river, is below Toome-bridge and the place known as Toome Fisheries; and that the plaintiff was tenant of said fisheries, to the Marquis of Donegall, and was personally interested in the maintenance and conservation of the navigation of the Lower Bann. The summons and plaint then charged the defendants with sundry defaults and neglect of duty, whereby the navigation of the Lower Bann was disturbed and impeded within the limits of the plaintiff's fishery, and the due breadth of the channel was narrowed by divers piles, &c., and the said channel and navigation frequented by poachers, trespassers, &c., for unlawful purposes, with boats, &c., and by them unlawfully obstructed; and it is alleged that the persons aforesaid had committed violence and done injury to, and obstructed the plaintiff's fishermen, &c., while employed in said fishery: alleging special damage. The plaintiff also claimed a writ of *mandamus* to command the defendants to cause to be removed, and henceforth to discontinue all obstructions by stakes, piles, poles, timbers, ropes, nets, and other implements in, through, upon, or across the channel of that part of the Lower Bann River running and flowing between Lough Neagh and the bridge of Coleraine; and moreover henceforth to maintain and conserve the said channel and the navigation thereof, open, free and unobstructed, according to the full breadth, and in as full and ample a manner in all respects as the said channel and navigation were cleared in pursuance of the several statutes in that behalf, &c., &c. To this the defendants demurred.

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GATION.

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*Common Pleas*  
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*D. R. Pigot and Joy*, in support of the demurrer.

*Phillips and Dowse*, contra.

The following cases were cited:—*Vicars v. Wilcocks* (a); *Walker v. Goe* (b); *Hoey v. Felton* (c); *Caledonian Railway Company v. Ogilvy* (d); *Dunne v. Petley* (e); *Duncan v. Findlater* (f); *Dickson v. Blackmore* (g); *Barnaby v. Lancaster Railway Co.* (h); *Mersey Dock Board v. Penhallow* (i); *Wells v. Watling* (k); *Hobson v. Todd* (l); *Patrick v. Greenway* (m); *Ward v. Ward* (n); *Rochdale Canal Co. v. King* (o); *Bowen v. Hill* (p); *Rex v. Bristol Dock Co.* (q); *Hamilton v. Marquis of Donegall* (r); *Reedie v. L. and N. W. Railway Co.* (s); *Rex v. Moore* (t); *Buller's N. P.*, p. 204 a; *Woolrych on Waters*, p. 239.

*Cur. ad. vult.*

MONAHAN, C. J.

May 2.

The present proceeding has been brought by the plaintiff, in the combined form of an action to recover damages for an injury to his several fishery, and an application for a writ of *mandamus* to compel the defendants, as Trustees of the Navigation of the Lower Bann River, to do certain acts which the plaintiff alleges that they, as such trustees, are bound to perform. Our jurisdiction to grant a *mandamus* is of course much more restricted than that of the Court of Queen's Bench, relative to the prerogative writ of *mandamus*; still, as duties are imposed on the Commissioners by Act of Parliament, if a proper case were made out, a *mandamus* might

(a) 2 Sm. L. C. 461.

(b) 3 H. & N. 395; S. C., 4 H. & N. 350.

(c) 11 C. B., N. S., 142.

(e) 15 Q. B. 276.

(g) 9 Q. B. 991.

(i) 7 H. & N. 329.

(l) 4 T. R. 71.

(n) 3 Ex. 748.

(p) 1 Bing., N. C., 549.

(r) 3 Ridg. P. C. 267.

(d) 2 Macq. H. of L. Cas. 229.

(f) 6 Cl. & Fin. 894.

(h) 11 A. & E. 223.

(k) 2 A. & Bl. 1233.

(m) 1 Wms. Saund. 346 b.

(o) 14 Q. B. 122.

(q) 9 D. & R. 309.

(s) 4 Ex. 244.

(t) 2 B. & Ad. 184.

properly be granted by this Court. The plaintiff has instituted the proceedings, not as a person accustomed to navigate the river, or as a party interested in the free passage of vessels up and down the river, but as the lessee of a several fishery extending over only a certain portion of the river, while other parties are also entitled to several fisheries higher up the same river.

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The plaintiff being lessee of this fishery, for which he pays £300 a-year, for the purpose of bringing his case within the provisions of the Common Law Procedure Act, alleges in his summons and plaint that he is personally interested in the maintenance and conservancy of the navigation of the Lower Bann River, as improved and effected by the Commissioners, not only at those parts over which the plaintiff's right of fishing extends, but also at those parts higher up the river; to wit, where the Toome fisheries subsist, and also at the parts situate between the bridge of Coleraine and Lough Neagh; and is personally interested that no obstruction should exist in the channel above his fishery; and that he is personally interested in having, and is entitled to have, the channel of the river along its entire length from Lough Neagh to the bridge of Coleraine kept at its full breadth; and that it should be maintained by the defendants, open, navigable, and free from obstruction; and that it should not be frequented or used by poachers, &c.; and also that the plaintiff, his fishermen, servants, boats, nets, and implements of fishing should be kept protected by the defendants from all violence, &c.; and that it was the duty of the defendants, pursuant to the provisions of the several statutes and awards in the summons and plaint mentioned, to maintain and conserve at all times the navigation of the Lower Bann River, &c.; and to take care and procure that the channel of the said navigation above the plaintiff's fishery, to the full breadth, to wit, sixty feet, should be maintained at all times open and free from obstruction and impediment, and should not be used or frequented by poachers, &c.; and that it was the duty of the defendants to protect the plaintiff, his fishermen, &c., from all violence, &c., on the part of such persons, and, if necessary, to make suitable and proper bye-laws and regulations under their

E. T. 1863. authority in that behalf. He then states that the defendants did not  
*Common Pleas* do these things, but, on the contrary, acted so negligently and  
HASTINGS wrongfully in the performance and discharge of their duties that,  
v. from time to time, the navigation of the said Lower Bann River  
BANN NAVI- was so obstructed and impeded at various parts, to wit, at the eel  
GATION. weirs in Mr. Meenan's possession, below Toome-bridge, and at  
the eel weirs to the south of the new cuts at Brecarte, that is,  
at another person's fishery, and the due breadth of the channel  
was greatly narrowed, &c., by divers stake-poles, timbers, ropes,  
&c., being fixed in and across the channel at various places, and  
that the said channel and navigation have been from time to time  
frequented and used by poachers, &c., &c., and that the persons  
aforesaid have unlawfully intercepted and taken large quantities  
of eels, which otherwise the plaintiff would of right have taken  
in and by his fishery, &c.

The plaintiff alleged that he had a right to have the navigation conserved, not only at the part of the river where his own fishery extended, but higher up the river, so that, in point of fact, he wanted to have poachers prevented from interfering at any point of the river above his own fisheries, and he also required to have the channel widened at a point higher up the river. Now, as to the obstructions alleged to have been placed in the river, it is not alleged that these stake-poles and nets extended across the entire breadth of the stream; there might be quite sufficient space for the purpose of boats passing up and down; and there is no allegation that the plaintiff's boats were obstructed by reason of the stake-poles and nets, or that injury was occasioned which would entitle him to maintain an action against the defendants. It is quite clear that, without having recourse to the Bann Navigation Acts, if poachers or others improperly intercepted or prevented fish from coming down to the plaintiff's fishery, he could maintain an action against them for such disturbance; but there is no pretence for saying that the Trustees of the Bann Navigation are responsible for the acts of parties trespassing on plaintiff's several fishery. The plaintiff then cannot maintain any case against the defendants in respect of the acts of the poachers;

and the only other matter is as to requiring the defendants to widen and improve the channel in certain parts of the river. The plaintiff does not allege that, by any act of the trustees, the fish are prevented from coming to his fishery. What he alleges is, that by reason of their omitting to do certain acts he has sustained damage; not that his fishery has been actually injured, but that it is not as good as it would probably be if these acts were performed by the defendants. There is no authority for stating that the persons whose duty it is to conserve and maintain the navigation are responsible to the plaintiff, or that because the owner of a several fishery supposes that his fishery is not as good as it would be if certain acts were done by the defendants, he is therefore entitled to demand that those acts should be done, or to maintain an action for their non-performance. Plaintiff's supposed rights are altogether too remote. We are therefore of opinion that the plaintiff has no right of action as against the defendants, and, not being entitled to maintain an action, he is equally disentitled to a writ of *mandamus*.

On the whole, we are of opinion that defendants' demurrer must be allowed.

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E. T. 1862.  
*Queen's Bench*

MALONE v. MINOUGHAN.

(*Queen's Bench.*)

May 3, 13.

Where lands are conveyed by a deed operating under the Statute of Uses, the grantee or releasee to uses is not entitled to the possession of the title-deeds.

And therefore, where the lessee of a freehold lease granted the demised premises, by way of settlement, to A, to hold in trust for B, his heirs, executors, administrators and assigns, for all his (the lessee's) interest therein—

*Held* [dissentiently *HAYES, J.*], that A could not maintain an action of detinue for the indenture of lease.

DETINUE.—This was an action of detinue, brought to recover an indenture of lease of the 21st March 1832, whereby certain premises, situate in the town of Belmullet, in the county of Mayo, were demised for a term of lives and years, of which the lives were in existence and the years unexpired at the time of action brought. By an indenture of settlement, dated the 1st May 1861, and made between Thomas Minoughan sen. (the defendant) of the first part, Thomas Minoughan jun. of the second part, Mary Boland of the third part, and the Rev. Patrick Malone (the plaintiff) of the fourth part, and executed on the occasion of the marriage of the said Thomas Minoughan jun. with the said Mary Boland, the premises demised by the lease of the 21st March 1832 were granted, by the defendant, to the said Rev. Patrick Malone, "together with all deeds, papers, and muniments of title relating to the said premises, . . . to have and to hold the said messuages, lands and premises demised by the said in part recited indenture of lease, and hereby granted and assigned, or intended so to be, with their appurtenances, unto the said Rev. Patrick Malone, in trust for the said Thomas Minoughan jun., his heirs, executors, administrators and assigns, from and after the solemnization of the said intended marriage," for all his (the defendant's) interest therein. The case was tried at the last Spring Assizes for the county of Mayo, before the Hon. Mr. Justice O'BRIEN. The plaintiff read in evidence the settlement of the 1st May 1861, and proved demand of the lease of 1832. It appeared that the defendant had possession of the lease, or at least all that remained of it; and he produced some small pieces of parchment, and stated that was all that remained of the lease, and that the rest had

been destroyed by accident. At the close of the case, the learned Judge left two questions to the jury—first, whether there had been a demand of the lease before action brought; and, secondly, whether the defendant had any other portions of the lease in his possession than those produced. The jury found the former question in the affirmative; and the latter in the negative.

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v.  
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The learned Judge, being of opinion that the action should have been brought in the name of Thomas Minoughan jun., and not in the name of the Rev. Patrick Malone, directed a general verdict for the plaintiff and reserved liberty to the defendant to move to have that verdict set aside, and a verdict entered for him, if the Court above should be of opinion that the action had been rightly brought in the name of the Rev. Patrick Malone.

*Walter Bourke*, on a former day in this Term, obtained a conditional order, pursuant to the leave reserved.

*James Robinson* and *Michael Morris* now showed cause.

*Walter Bourke* and *Beytagh*, in support of the conditional order.

*James Robinson.*

The action should have been brought in the name of Thomas Minoughan jun. It is clear that the statute has executed the use in him; and therefore, both at Law and in Equity, he is owner of the lands demised by the lease of 1832.

*Prima facie*, the owner of lands is entitled to the possession of the title-deeds. In *Goode v. Burton* (a), Rolfe, B., says:—"It follows therefore that the plaintiff, appearing, as he does on these pleadings, to be the owner of the land, is certainly also entitled to the title-deeds; unless there be something in the plea to cut down his *prima facie* right." And *Lord St. Leonards*, in commenting on the old doctrine that the Statute of Uses, though it transfers the estate, does not interfere with the title-deeds, says:—"Certainly there is considerable authority for this statement, but there is hardly one case in which it was necessary to decide the point; and it has been questioned by Lord Hardwicke, who said that

(a) 1 Exch. 194.

E. T. 1862. "though it was so clearly established, he knew not but, when it  
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 MALONE  
 v.  
 MINOUGHAN. "greave" (a).

In *Cruise's Digest*, tit. *Deed*, p. 32, c. 11, s. 19, it is said:—  
 "This doctrine is very questionable; as feoffees to uses have only a  
 "seisin of an instant, and are never called upon, and could not be  
 "called upon, to defend the land; and it seems reasonable to suppose  
 "that when a statute transfers the legal seisin of the lands from one  
 "person to another, it should also transfer the deeds relating to the  
 "title of such lands, as they must be totally useless in the hands of  
 "a person who has no interest in the estate." But whatever doubt  
 may have existed on the subject has been removed by the 23 & 24  
*Vic.*, c. 38, s. 7,\* which has swept away every conceivable estate  
 which the releasee to uses may have had previously to the passing  
 of that statute.

*Walter Burke and Beytagh.*

The action was properly brought in the name of the Rev. Patrick  
 Malone, the grantee to uses under the settlement of 1861. The  
 23 & 24 *Vic.*, c. 38, s. 7, only deals with the *scintilla juris*, and does  
 not affect the question before the Court, which is, the right of the  
 grantee or releasee to uses to the possession of the title-deeds. The  
 cases on the subject are collected in the *note* to 1 *Williams's Saun-*  
*ders*, p. 9, where it is said:—"When a person pleads a deed  
 "operating under the Statute of Uses, there is no necessity of  
 "making a profert;" and for that he cites *Estoff's case* (b); *Earl*

(a) 1 Sug. V. & P. 464, ed. 11.

(b) Dyer, 277 a.

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\* The 23 & 24 *Vic.*, c. 38, s. 7, is as follows:—"Where, by any instrument,  
 any hereditaments have been or shall be limited to uses, all uses thereunder, whe-  
 ther expressed or implied by law, and whether immediate or future, or contingent  
 or executory, or to be declared under any power therein contained, shall take  
 effect when and as they arise by force of, and by relation to, the estate and seisin  
 originally vested in the person seised to the uses; and the continued existence in  
 him or elsewhere, of any seisin to uses or *scintilla juris*, shall not be deemed  
 necessary for the support of, or to give effect to, future or contingent or executory  
 uses; nor shall any such seisin to uses or *scintilla juris* be deemed to be suspended,  
 or to remain or to subsist in him or elsewhere."

of *Huntingdon v. Mildmay* (a); *Stockman v. Hampton* (b); *Reynel v. Long* (c); *Read v. Brookman* (d); and *Bolton v. The Bishop of Carlisle* (e). In *Gilbert on Uses*, by *Sugden*, p. 81, n, it is said:—

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"In the common case of a conveyance to uses to bar dower, the purchaser himself should be the releasee; because, although upon principle the deeds ought to pass with the estate, yet the authorities all agree that the deeds do not appertain to *cestui que use*, but to the feoffee by the Common Law; and the statute doth not transfer them to him;" and, at the end of the *note*, it is said:—"The consequence of this doctrine is, that *cestui que use* may plead the deed without profert."

MINOUGHAN.

In all the passages cited from text-writers, it is admitted that the doctrine contended for by the plaintiff is well established, though some of them disapprove of it; and in the case of *Whitfield v. Pausset* (f), cited for the opinion of Lord Hardwicke that that doctrine rested on a spongy reason, he admits that the doctrine itself is clearly established. In *Jenkins v. Peace* (g), Lord Abinger, in delivering the judgment of the Court, says:—"These exceptions, of deeds operating under the Statute of Uses" (that is, exceptions to the rule that where a party pleads a deed, who is party or privy to it, he must make profert of the deed), "probably therefore arose from the circumstance that such conveyances were in form conveyances to A to the use of B; and so A, not B, was considered to have the possession of the deed; and consequently, when B pleaded it, the Judges did not require him to make profert. Another reason is to be found in some cases, viz., that the party pleading is not in '*in the per*;' which is in fact only another technical mode of expressing the same thing. If a man is in '*in the per*,' he is in by the party executing the deed; if in '*in the post*,' he is in by the party to whom the deed is executed. This appears from *Vin. Abr.*, tit. *Feoffment* (A 4), who states it thus:—"In the case of a feoffment by the statute of 2 Ric. 3, the

(a) Cro. Jac. 217.

(b) Cro. Car. 441.

(c) Carth. 315; S. C., Sir W. Jones, 377.

(d) 3 T. R. 151.

(e) 2 H. Bl. 262.

(f) 1 Ves. 394.

(g) 6 M. & W. 722.

E. T. 1862. "feoffees are *in the post*—viz., by the first feoffees.' In such cases  
*Queen's Bench* "therefore those to whom the deed is executed are presumed by  
 MALONE "law to have the possession of the deed; and the others, to whose  
 v.  
 MINOUGHAN. "use they hold, not having the deed, cannot be required, when  
 "claiming under it by pleading, to make profert."

It is not alone as incidental to his estate that the plaintiff lays claim to the possession of the lease; by the settlement of 1861 it is expressly granted to him.

*M. Morris*, in reply.

All that was decided in the case of *Jenkins v. Peace* (a) was, that a party pleading a lease and release must make profert of the release; but that was because a release is a conveyance operating at Common Law.

The cases cited by the plaintiff have all arisen on the question whether it was necessary to make profert of a deed, when the party pleading it took under the Statute of Uses.

*Cur. ad. vult.*

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FITZGERALD, J.

May 13.

This was an action of detinue, brought to recover an indenture of lease of the 21st March 1832. The plaintiff alleged in his plaint that he was entitled to that lease, and that it had been vested in him, together with the lands the subject-matter of the demise, by a deed of settlement, executed by both the plaintiff and the defendant. To this action the defendant took defence, and pleaded two pleas—firstly, that he did not detain the deed, as alleged; and, secondly, that the deed was not the property of the plaintiff. Issue being joined on these two pleas, the case came to be tried before my Brother O'BRIEN; and, upon examination of the deed of settlement, he was of opinion, and so ruled, that the plaintiff was not entitled to the deed in question, but that the right to the possession of it was in another party; and accordingly he directed a verdict for the defendant. The question involved is one of considerable importance. The settlement is dated the 1st May 1861, and made between

(a) *Ubi supra.*

Thomas Minoughan sen. of the first part, Thomas Minoughan jun. of the second part, Mary Boland his then intended wife of the third part, and the Rev. Patrick Malone, the plaintiff in the action, of the fourth part. That settlement recites the lease in question, by which certain lands were demised to Thomas Minoughan the elder, his heirs, executors, administrators and assigns, for three lives (still in existence) or thirty-one years, whichever might longest last; and recites also that a marriage had been arranged to take place between Thomas Minoughan the younger and Mary Boland; and that, upon the treaty for such intended marriage, it was agreed upon that the said Thomas Minoughan the elder should assign and convey all his right, title and interest under the said indenture of lease to the said Rev. Patrick Malone, in trust for the said Thomas Minoughan the younger, his heirs, executors, administrators and assigns. After these recitals, the indenture witnesses that "Thomas Minoughan the elder granted, bargained, released and assigned to the said Rev. Patrick Malone, in trust for the said Thomas Minoughan the younger, his heirs, executors, administrators and assigns, all that and those the messuages, lands and premises demised by the said indenture of lease, *together with all deeds, papers, and muniments of title relating to the same premises*, to have and to hold the same premises in trust for the said Thomas Minoughan the younger, from and after the said intended marriage."

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The deed is one of the simplest character. It is an assignment to Patrick Malone, in trust for Thomas Minoughan the younger, from and after the solemnization of the marriage. There can be no pretence that there was any contingent use or interest to arise in respect of which a continuance of the title of the Rev. Patrick Malone was necessary; and there can be no reason why he should come forward to defend the estate, or claim the muniments of title. The deed concludes with this declaration, that "Patrick Malone is to be considered as merely a formal party; in whom however the aforesaid messuages, property, rights and premises are hereby vested, for the purposes aforesaid." Upon that deed being given in evidence at the trial, my Brother O'BRIEN was of opinion that, as it was a conveyance to Patrick Malone, in trust for Thomas

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**MALONE**  
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**MINOUGHAN.**

Minoughan the younger, and as all title to, and interest in, the lands under it vested in the said Thomas Minoughan immediately on the solemnization of the marriage, the estate in the lands drew with it the right to the possession, not only of the deed of settlement, so necessary to establish that estate, but also of all the muniments of title; that consequently the action had been improperly brought in the name of Patrick Malone, who had no estate, right or interest in the lands; and that it should have been brought in the name of Thomas Minoughan the younger, in whom the entire estate and interest in the lands had vested. Accordingly, my Brother O'BRIEN directed a verdict for the defendant; and the question now comes to be considered on motion pursuant to the leave reserved. The plaintiff, in sustainment of his conditional order, relied on this principle, which he said was established by authority—namely, that, though true it was that, in ordinary cases, the title to the lands drew with it the right to the possession of the deeds, yet a distinction existed in the case of deeds operating under the Statute of Uses. That distinction, he said, was founded on this, that before the Statute of Uses the estate of the *cestui que use* was a mere equitable interest; that the legal estate in the lands, and the right to the possession of the deeds, remained in the feoffee or releasee to uses; that the statute had no further effect than to transfer the legal estate in the lands to the *cestui que use*; that it did not affect the right to the deeds; and that the right to the possession of the deeds, and of all muniments of title, remained, as before the statute, in the feoffee or releasee to uses, though possibly he might be deemed, in Equity, a trustee for the *cestui que use*. In support of that proposition, he called our attention to a passage in *Saunders's Essay on Uses and Trusts*, where the learned writer, in treating of the estate of the grantee, says:—"With respect to the feoffee, he has no interest at all in the land; and therefore, on his account, it cannot escheat nor be forfeited; nor is it subject either to dower or courtesy on account of his momentary seizin. However, as the statute only transfers the legal estate to the use, it does not interfere with the title-deeds; and therefore it is a point which appears to me to be clearly settled, that the feoffee or grantee to uses is entitled to the

"*custody of them*. Upon this account, it has been repeatedly determined that a *profert* is not necessary in pleading a gift under "the Statute of Uses" (a). That position, if it were to be carried out to its full extent, would, under the circumstances of the present case, establish the plaintiff's title to this deed, and his right to maintain this action. But the question we have now to determine is, whether that is good law at the present day, and whether we are to carry it out in the present instance, and to what extent?

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Several authorities are referred to in *Saunders*, in support of that proposition; and the first is that of *Estoffe v. Vaughan* (b). That was an action brought by a *cestui que use* in remainder; and the question there was, whether *profert* of the instrument creating the remainder was necessary: in other words, whether, if the plaintiff be a *cestui que use* under a feoffment, he must make *profert*. The Judges were of opinion that he was not bound to do so, and for two reasons:—the first, which does not apply here, was sufficient to decide the case; the second was, that the deed belonged not to the plaintiff—that is, not to the *cestui que use*, but to the feoffee to uses; and this latter reason is given without explanation. The second case given in *Saunders* is that of *Stockman v. Hampton* (c), which arose upon a deed of covenant to stand seised; and it was there held, for several reasons, that it was unnecessary for the plaintiff to make *profert* of the deed—one reason being, that the deed did not belong to the party taking an interest in the lands under it, but to the covenantees. As I have said, that case was decided on several grounds, any one of which, if good, would have been sufficient to have excused *profert*; but the main reason was, that the covenantees were the parties entitled to the possession of the deed. The third case is that of *Huntingdon v. Mildmay* (d), which I shall not observe upon at any length; it is to the same effect, and stands on the same ground as the two cases I have already adverted to. The next case is that of *Reynell v. Long* (e). This case also arose on the question of *profert*, and is subject to the

(a) 1 *Saunders' Uses*, 117.

(b) *Dyer*, 277 a.

(c) *Cro. Car.* 441.

(d) *Cro. Car.* 217.

(e) *Carth.* 315.



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same observation as I have already made with regard to the cases of *Estoffe v. Vaughan* and *Stockman v. Hampton*—namely, that although the question as to the right of the feoffee or grantee to the possession of the deeds arose there, it was not necessary for the decision of the case; and this additional reason is given, that the party was in merely by operation of law, and not *in the per*. The case of *Whitfield v. Faussett* (a) was also referred to, in which, upon a collateral question, Lord Hardwicke, in discussing these cases, observes:—"Although this is so clearly established" (that is, the fact of the plaintiff being *cestui que use* as an excuse for *profert*), "I know not but when it is considered it may be called a spongy reason, as Lord Vaughan says"—that is, the reason for the excuse for *profert*.

It will be observed that all these cases were decided with reference to the Common Law rule, which required *profert* of the deed under which the party pleading claimed or justified, and to which he was entitled; that they all arose in the same way, and related, not to the muniments of title to the estate, but to the deed itself under which the party claimed or justified—whether a covenant to stand seised, a feoffment, grant, or release. If it were necessary to consider the reasons on which these cases rested, we would find them stated, to some extent, in the case of *Jenkins v. Peace* (b). That case arose also on the question of *profert*; but it is no authority for the present one, as the decision related to *profert* of a Common Law conveyance. In that case, Lord Abinger held *profert* to be necessary; and adverting, in his judgment, to deeds operating under the Statute of Uses, he says:—"These exceptions, of deeds operating 'under the Statute of Uses, probably therefore arose from the circumstance that such conveyances were in form conveyances to A 'to the use of B; and so A, not B, was considered to have possession of the deed; and consequently, when B pleaded it, the Judges 'did not require him to make *profert*. Another reason is to be 'found in some cases—viz., that the party pleading is in 'in the '*per*;' which is in fact only another technical way of expressing the 'same thing. If a man is in 'in the *per*,' he is in by the party

(a) 1 Ves. 387.

(b) 6 M. & W. 722.

“executing the deed ; if in ‘in the *post*,’ he is in by the party to whom the deed is executed. This appears from *Vin. Abr.*, tit. “‘*Feoffment*’ (A 4), where it is stated thus:—‘In the case of a “feoffment at Common Law, the feoffee is in in the *per, scilicet* by the feoffor ; but in the case of a feoffment by the statute of “2 *Ric.* 3, the feoffees are in in the *post*—viz., by the first feoffees.’ In such cases therefore those to whom the deed is executed are “presumed by law to have possession of the deed ; and the others, “to whose use they hold, not having the deed, cannot be required, “when claiming under it by pleading, to make *proferri*.”

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It is happy for us, in these modern times, that we are not obliged to cumber ourselves with abstruse learning of this kind ; or with the discussion of propositions which, however logical they may be, have very little reason to support them. I do not apprehend that, at the present day, it will be necessary for us to consider the technical learning which arose on the operation of the Statute of Uses. Any one who wishes to investigate the law on that subject will find the whole matter discussed in *Chudleigh's case*, or rather the case of *Dillon v. Freine*, as it is called. That case throws some light upon the reason of those decisions which were made at an early period upon the Statute of Uses, and upon which *Saunders* relies for the proposition he has laid down. The case of *Dillon v. Freine* arose upon a question which was then for the first time settled—namely, the extent to which the estate of the feoffees to uses was to be continued, in order to support the contingent uses which might from time to time spring up. That question is fully discussed ; and we find Clarke, B., concluding a very able and learned judgment, as it was considered at the time, in these words :—“Some have supposed “these future uses were preserved in the bowels of the land, and “that the land should be charged with them in whose hands soever “it should come ; and some have supposed they were preserved in “*nubibus*, and in the custody of the law : but,” he said, “in our “case, be they below in the land, there they shall be perpetually “buried and shall never rise again ; and be they above in *nubibus* “in the clouds, there they shall always remain, and shall never “descend.” At that period the Bench seem often to have employed

E. T. 1862. themselves in discussing questions of this sort, with very great  
*Queen's Bench* learning, no doubt, but with what was, in reality, nothing but legal  
 MALONE jargon. But we are to decide this case at a different time, upon  
 v. different grounds, and with different lights. But before leaving that  
 MINOUGHAN. note in *Saunders's Uses*, I shall refer to one case, which was not  
 alluded to in the argument, and which is a better authority than any  
 which has been cited, I mean the case of *Sacheverell v. Bagnoll* (a).  
 That case did not arise upon *profert*; it was an action of waste, by  
 a first tenant in tail under a feoffment to uses, against the husband of  
 tenant for life. The tenant for life died before action brought; and  
 the defendant pleaded, in bar, accord and satisfaction—viz., that  
 the feoffees delivered to him the deed of feoffment to uses, which he  
 delivered to the plaintiff in satisfaction of the waste. To that plea  
 the plaintiff demurred. The case was decided on several grounds;  
 but the point to which I am about to refer was not necessary for  
 the decision of the case. It was argued that there could be no  
 satisfaction, because the deed belonged to the tenant in tail; and to  
 give him his own deed could be no good ground of satisfaction. But  
 the answer given by the Court was, that here the delivery was good  
 matter of satisfaction, because the deed did not appertain to the  
*cestui que use*—that is, to the tenant in tail—but to the feoffees by  
 the Common Law; that the statute doth not transfer it to the *cestui*  
*que use*; and therefore that delivery to him of that which was not  
 his—that is, of the deed of feoffment—was a good satisfaction.  
 That case, it will be observed, arose upon demurrer, and did not  
 depend on *profert*; and it is the only case I have been able to find  
 in which it was held, otherwise than upon *profert*, that the deed of  
 feoffment creating the uses, or the title-deeds of the estate, remain  
 in the feoffees or releasees, and do not follow the lands: and it will  
 also be remarked that, in that case, the decision related, not to the  
 muniments of title, but to the deed of feoffment. But, what may  
 have been the true foundation of those decisions, it is not neces-  
 sary for us now to determine; and indeed it might be very difficult  
 at the present day to ascertain. Those cases arose, for the most  
 part, at a time when there seems to have been a very great astute-

(a) Cro. Eliz. 356.

ness exhibited on the part of the Judges of the land to defeat the true operation of the Statute of Uses; and when we find *Lord Bacon*, in his reading on that statute, speaking of it as "a law "whereupon the inheritances of this realm are tossed at this day "like a ship upon the sea, in such sort that it is hard to say which "bark will sink and which will get to the haven"(a). But, whatever may have been the true foundation of those decisions, there can be no doubt that we have them bearing on their face this principle, that the feoffee or grantee to uses is the party entitled to the possession of the title-deeds: and we must therefore deal with those cases as we find them. We have it then established, in several cases, that a *cestui que use* may excuse *profert*, on the ground that the deed belongs to the feoffee or releasee to uses, and not to the party who has an interest in the lands; and we have the case of *Sacheverell v. Bagnoll*, arising on demurrer, in which the same proposition is laid down. The principle of all these cases is this, that the possession of the charter of feoffment or deed of release, or of the muniments of title, belongs to the feoffee or releasee, and not to the owner of the lands; and what we have now to determine is, whether that can be supported at the present day, as a rule of law applicable to all the muniments of title.

In the course of the argument, Mr. *Robinson* referred us to a passage in the last edition of *Lord St. Leonards's Treatise on the Law of Vendors and Purchasers*, where the learned writer disapproves entirely of the proposition laid down by *Saunders*, and supposed to be established by those early authorities; and not only does *Lord St. Leonards* disapprove of that proposition, but he uses most persuasive and cogent arguments to show why that rule was, as he says, founded on spongy reasons, and ought not to be maintained; and the same opinion is expressed by Mr. *Cruise*, in his *Digest* (b). But, in addition to the dissent expressed by *Lord St. Leonards* to that proposition as a rule of law (and certainly the opinion of that learned writer upon any question arising on the law of real property is entitled to as

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(a) Bacon's Works, Montague's ed., vol. 13, p. 313.

(b) Cruise's Digest, vol. 4, tit. 32, c. 11, s. 19.

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great weight as could be given by a Court of Justice to any opinion expressed not under judicial responsibility), he is supported in that view by a host of authorities. In the case of *Harrington v. Price* (a), Lord Tenterden, in delivering judgment, states the rule thus:—"To us sitting in a Court of Law, this is "a very clear case. It is an established principle that whoever "is entitled to the land has also a right to all the title-deeds "affecting it." That rule he lays down as an established principle, without exception or qualification; and that view, so taken by Lord Tenterden, is borne out by other authorities too numerous to advert to in detail. But in one case, that of *Lord v. Wardle* (b), the rule is thus stated by Tindal, C. J., that, if the property conveyed passes by the deed, the deed itself passes without further words. In stating the rule to be so, Tindal, C. J., was only following what was laid down by Sir Edward Coke, in *Lord Buckhurst's case* (c), which arose in the Court of Chancery; but the rule is the same in both Courts. In that case, it was held that, if a party convey lands to one without warranty, the party is entitled to all the charters and evidences, though without express words; but where he conveys with warranty, it is otherwise, because he may require the deeds to establish his own warranty. The same proposition is laid down in *Philips v. Robinson* (d), where Best, C. J., says:—"It is a clear "principle of law that the muniments of an estate belong to the "person who has the legal interest in it." In *Newton v. Beck* (e), the same rule will be found; and in *Goode v. Burton* (f), there is a judgment of Wolfe, B., on the same subject, well worthy of our attention. These authorities appear to be in conflict with the earlier cases which I have observed upon; and between these two classes of cases we have now to decide.

I apprehend that it is a clearly-settled rule, both at Law and in Equity, that the ownership of the lands draws with it the right to the possession of the title-deeds; and in support of that we can refer to abundant authority in Courts of Equity (but there is really no

(a) 5 B. & Ad. 170.

(c) 1 Rep. 1.

(e) 3 H. & N. 220.

(b) 3 Bing., N. C., 680.

(d) 4 Bing. 109.

(f) 1 Exch. 189.

difference between the two Courts), where the rule is laid down without exception or qualification. We have now to determine whether we are to follow these later authorities thus laying down, in broad and unequivocal terms, the right of the owner of the lands to the possession of the title-deeds; or adopt the principle of those early decisions, and establish an exception in the case of deeds operating under the Statute of Uses. In the latter case, we must be prepared to hold that, though the effect of a conveyance to uses is absolutely and out and out to extinguish the use, and transfer the estate to the *cestui que use*, yet the deeds are still left, as before the statute, in the hands of the feoffee or releasee to uses. In the conflict which exists between these two classes of cases, I have no hesitation in saying that, at the present day, both principle and authority lead to the conclusion that the ruling of my Brother O'BRIEN was correct; that, in the particular case before us, the Rev. Patrick Malone the plaintiff had no title—no interest, legal or equitable—no right whatsoever to the possession of this deed; that, by the operation of the deed itself, the very moment it was executed, every particle of interest in the lands was taken out of him; and though the deed was granted by express words, yet the right to it passed immediately with the lands to Thomas Minoughan the younger; and that, as he was entitled out and out to the lands, it was he alone who was entitled to sue. The very reason of the thing appears to me to favor that view; and when we come to deal with those two classes of cases, and see upon which reason bears, I am at a loss to discover any good or sustainable ground—anything but the merest and purest technicality, to support the principle of those earlier authorities. No one could suggest a reason why they should be now maintained. They might have been supported at a time when it was supposed that the feoffee or releasee to uses retained in himself some estate, or possibility of an estate, or a *scintilla juris*, as it was called—when it was supposed that he might have to defend the estates and rights of those claiming under the contingent remainders created by the deed. But now the effect of the recent Act of Parliament\* has been to abolish all necessity for

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\* 23 & 24 Vic., c. 38, s. 7.

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the existence of the *scintilla juris* to support contingent remainders; and I defy any one at the present day to find out any good or sustainable reason—anything more than the purest and most whimsical technicality—to support the rule that the right to the deeds remains in the feoffee or releasee to uses. All reason goes the other way: the feoffee to uses now retains no estate or interest in the lands; the effect of the recent statute has been utterly to extinguish every shadow of interest or title which he may have had. His title is gone; he has now no estate, title or interest remaining; and I am happy to say that the doctrine of the *scintilla juris* is now exploded.

As regards the land, the feoffee to uses has now nothing to assert, nothing to defend; and why he should retain his right to the feoffment—his right to the grant—his right to the release—his right to the deeds and muniments of title, I am at a loss to discover. But see, on the other hand, the inconvenience that would ensue from leaving the deeds in his hands. Suppose the feoffee dies, what is to become of them, if that old doctrine is to prevail? To whom are they to go? They cannot go to his heir; for they could only go to him as following the lands, in case some estate in the lands devolved on him; but that cannot be, because the feoffee retained no estate whatsoever in the lands. Will they go then to the executor? For what purpose? He has nothing to defend. Deeds are not mere chattels; they are the muniments of title to the lands; and if they go neither to the heir nor to the executor, to whom are they to go? Then see who it is that wants the deeds—the owner of the lands; he has to assert his right—to defend his title. To him they are the very sinews of the estate—the thing without which he cannot get on; and are we to be told that, instead of belonging to the person to whom they are of so much importance, they are legally and equitably to remain in the hands of the feoffee or releasee?

In that state of the authorities, although I am inclined to pay as much deference as anyone to early decisions, I think that, not only does modern precedent, principle and authority, but the reason and necessity of the case, call upon us to decide that the party entitled to the possession of the deeds is the party entitled to the lands.

In the case which is now before us for our decision, it will be

observed that the deed is one of the simplest character to which Thomas Minoughan the younger is a party; that he takes under it a present and vested interest, and that he immediately represents the whole estate. The deed has the same effect as if Patrick Malone was not named in it at all, and as if the lands had been granted immediately to Thomas Minoughan the younger.

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Upon that state of facts, and on the grounds which I have already stated, my judgment and opinion is, that my Brother O'BRIEN was right in his ruling, and that the verdict should not be disturbed.

HAYES, J.

The question for the decision of the Court is not burdened with any complicated state of facts; but, just on that account, it is all the more important.

Can releasee to uses maintain an action of detinue, for the muniments of title relating to the estate conveyed to him by the defendant's deed, and which muniments are also themselves, by the same deed, expressly conveyed to him?

The action of detinue lies for the recovery of a specific chattel; and it is brought against the person who has the actual possession of it, which he has acquired by lawful means; as, by finding, or by delivery, or by bailment, or other contract. It is to be brought by the person who has, at the time, such a property in the chattel as entitles him to the immediate possession of it.—[See *Kettle v. Browsall* (a); *Gledstane v. Hewitt* (b).] It is not necessary that he should be the absolute owner; it is enough if the plaintiff have such a special property in the chattel as entitles him to the immediate possession: *Com. Dig. Detinue, A.*

Keeping those principles in mind, let us see whether, as against the grantee of lands and deeds, the releasee to uses is so entitled to the immediate possession of the deeds that he can enforce delivery of them. With the rights of tenant for life and remainderman, either *inter se* or as against the releasee to uses, we have here

(a) Willes, 118.

(b) 1 Cr. & J. 565.



E. T. 1862. nothing to do. We leave it to another time and place to determine those questions.

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The question before us is to be discussed just as it would have been the year after the passing of the Statute of Uses, and without being mixed up with those questions of equitable right to which I have referred, and which tend rather to mislead and embarrass than to assist. In *Estoffe v. Vaughan* (a), Estoffe brought his formedon in the remainder, and in pleading his title as *cestui que use*, he did not make profert of the deed creating the remainder; for which omission there was a demurrer. The case was interrupted by the death of the demandant; "but, by the opinion of the Justices, *prima facie* it seemed, that the demandant in this case needed "not to show the deed of remainder, for two reasons—one, for that "the remainder may commence without deed in this case; and *also* "the deed does not belong to him, but to the feoffees," &c.

The next is *Wilby's case* (b), in which the plaintiff pleaded title under a covenant to stand seised, without making profert; and the pleading was, on demurrer, held good; "for the party is not privy nor party to it, nor hath he a remedy to come to it."

It may perhaps be urged that, in both those cases, the question arose on the pleadings; and that this form of pleading, which was quite unexceptionable before the passing of the Statute of Uses, was allowed to continue unchanged after the statute. Let us see whether the matter rests on no better foundation. "The reason," says Lord Coke [*Co. Lit.*, p. 121 b], "wherefore a deed that is "pleaded ought to be showed to the Court is, because every deed "must prove itself to have sufficient words in law; whereof the "Court must adjudge; and also to be proved by others, as by witnesses or other proof, if the deed be denied, which is matter of "fact." Such is the reason given for the introduction into pleading of the rules as to making profert: rules however which did not universally hold, for the same learned writer tells us [p. 231 b] that "if the deed remain in one Court it may be pleaded in another Court, without showing forth; *quia lex non cogit ad impossibilia*." And this would appear to be a valid reason whenever the party

(a) Dyer, 277 a.

(b) Noy. 145.

pleading had not the deed, *and* had no right to demand it; but would seem to fail whenever the deed was shown to be either in his possession or power. So that if, immediately after the passing of the Statute of Uses, the *cestui que use*, and not the releasee to uses, became the rightful owner and holder of the deeds, one would expect to find, according to the maxim "*Cessante ratione, cessat ipsa lex*," that the rule of pleading would have been changed, and that the releasee to uses, becoming thus the true owner of the deeds, would have been compelled to produce the deeds to the Court; and thus serve the useful purpose referred to by Lord Coke.

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In *Sacheverell v. Bagnoll (a)*, the plaintiff brought an action of waste, and declared that Elizabeth Bingham, being seised in fee, enfeoffed Sir Gervaise Clifton, to hold to the use of the feoffor for life; remainder to her daughter for life; remainder to the plaintiff in tail; that, after the mother's death, the daughter entered, and married the defendant, who, during the coverture, committed waste. His wife then died; whereupon the plaintiff became entitled, and brought the action for the waste so committed. The defendant pleaded that the feoffee to uses had given to him the deed of feoffment to uses, and that he had given it to the plaintiff in accord and satisfaction of the waste. On demurrer to this plea, all the Court resolved that this was a good plea, admitting that the action lies, for it is in its nature personal; and, in every action personal, accord with satisfaction is a good plea; and here the delivery of this deed is good matter of satisfaction; for the deed did not appertain to *cestui que use*, but to the feoffees by the Common Law, and the statute doth not transfer it unto him; and Walmsley cited that it was adjudged in one *Ekinis' case*, wherein he was of Counsel, that the deed appertained to the feoffee, and not to *cestui que use*.

I regard this as a decision on the very point before us; and which has never, so far as I can ascertain, been since departed from by a Court of Law, but which has been followed by a long train of concurrent authorities; and although most of these authorities arose upon questions of pleading, still they are not the less valuable on that account, as they never would have been made unless the Court

(a) Cro. Eliz. 356.

E. T. 1862. had adhered to the principles it expressed in *Sacheverell v. Bagnoll*.  
*Queen's Bench* Indeed, in some of the cases, the very doctrine was pointedly put  
 MALONE forward. Let me refer to *Huntingdon v. Mildmay* (a); *Stockman*  
 v. *Hampton* (b); *Reynell v. Long* (c); *Denman v. Ball* (d);  
 MINOUGHAN. *Pentland v. Healy* (e); *Jenkin v. Peace* (f). These cases show  
 that in pleading a conveyance by lease and release, from A to B  
 simply, B must have made profert of the release, because that  
 conveyance operates at the Common Law; but if the conveyance  
 was from A to B to the use of C, then C was not obliged in  
 pleading to make profert of the deed: "firstly, because" (as it is  
 said in *Reynell v. Long*) "the deed doth not belong to him who  
 "is only *cestui que trust* [*use*], but it belongs to the grantees;  
 "secondly, because he" (the *cestui que use*) "*hath no remedy in*  
 "*law to get possession of the deed*; thirdly, he is in merely by  
 "operation of law, and not in *the per*."

I say nothing here of the right of the releasee to uses to with-  
 hold the deed from the *cestui que use*. It may very possibly be  
 that, if the struggle should be between those parties, the reasons  
 above assigned might indeed be deemed "spongy," as Lord Vaughan  
 has called them; still the matter assumes a very different aspect  
 when the controversy is between the releasee to uses, to whom the  
 deeds have been expressly granted, and the grantor, who now seeks  
 to set up, in derogation of the rights of the plaintiff, as derived  
 from his contract with the grantor, the *jus tertii* of the *cestui que*  
*use*, which did not even exist at the time of the execution of the  
 deed of conveyance, but has been since derived from the deed, by  
 the application of certain doctrines of Equity to the status and  
 rights of the parties, as effected by the Statute of Uses.

For these reasons, I think that this point ought to be ruled for  
 the plaintiff, and a verdict entered for him.

O'BRIEN, J.

The lease of March 1832, for the detention of which this action

(a) Cro. Jac. 217.

(b) Cro. Car. 441.

(c) Carth. 315.

(d) 9 B. Moo. 598.

(e) Al. & N. 164.

(f) 6 M. & W. 722.

has been brought, was for a freehold estate, still subsisting; and the lands comprised in it were, by the subsequent marriage settlement of May 1861 conveyed to the plaintiff, to the use of the plaintiff's son Thomas Minoughan junior, in whom the use was executed by the Statute of Uses, and who, accordingly, by the operation of that statute, took under said settlement the legal estate in said lands. I am of opinion that defendant's son also became entitled, under said settlement, to the lease itself—that it belonged to him, and not to the plaintiff; and that therefore the question reserved at the trial upon the second issue, whether that lease was the property of the plaintiff, should be ruled in defendant's favor.

Plaintiff's Counsel have relied chiefly upon the cases cited from *Dyer, Croke, and Carthrew*, in which it was held that a person, who was not the grantee or releasee, but the *cestui que use*, in a deed of conveyance of a freehold estate under the Statute of Uses (and in whom the use was executed by that statute), was not obliged, in pleading that deed, to make profert of it. They contend that those decisions were grounded on the doctrine that such a deed belonged, not to the *cestui que use*, but to the grantee or releasee to uses, and are therefore to be considered as express authorities for that doctrine; and they further contend that a similar principle should apply to the title-deeds under which the lands granted by such a conveyance are held; and that accordingly, under the settlement of May 1861, not merely that settlement, but also the lease of March 1832, became the property of the plaintiff.

With respect to those cases, and the necessity of making profert previous to the Common Law Procedure Act of 1853, it was certainly a rule of pleading that where a *cestui que use* under a deed, in whom the use thereby declared was executed by the Statute of Uses, relied in his pleading on that deed, it was not necessary for him to make profert of it: but the reason of this rule is stated in 1 *Chitty on Pleading*, p. 398 (5th edition), to have been because, "In such a case, the party obtains his title, not in virtue of the "intrinsic effect of the deed itself,\* but by the operation of the "statute, and is said to be *in by the law*." And it will be observed

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\* See also Viner's Abr., Feoffment.

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that, in two of the cases relied on, namely, *Stockman v. Hampton* (a) and *Reynall v. Long* (b), this reason was stated by the Courts as one of the grounds of their decision. It is also to be observed that, in another of the cases relied on, namely, that of *Estoffe v. Vaughan* (c), the decision of the Court was rested, not merely on the ground that the deed belonged to the feoffee to uses, but also on the ground that the remainder claimed by the party pleading "might have commenced without deed." It appears therefore that it was not necessary, in those three cases, to have decided the point in question; and a reference to the facts of one of them, namely, *Stockman v. Hampton*, will show that much reliance cannot be placed on it as establishing that the deed belonged to the grantee or releasee to uses, and not to the *cestui que use*. In that case, the deed was a covenant to stand seised to uses: the uses were served by the statute out of the seisin of the covenantor; there was no transfer of the estate to the covenantee; and though it was rightly decided that the *cestui que use*, or party claiming under him, was not bound to make profert of that deed, it would be difficult to sustain the proposition stated by the Court as one of the grounds of their decision, namely, that such deed belonged to the covenantee, to whom there was no transfer of any estate or seisin out of which the uses were to be served. It is true that, in another of the cases cited, namely, *Huntingdon v. Mildmay* (d), the only ground stated by the Court for their decision was, that the deed belonged to the grantee or feoffee, and not to the *cestui que use*; but that case appears to have been decided altogether on the authority of *Estoffe v. Vaughan*, therein called *Escot's case*. In another case cited in the argument—*Sacheverell v. Bagnoll* (e)—the Court also expressed their opinion that, where a party had got a deed of feoffment from the feoffee to uses, and delivered it to the *cestui que use*, in satisfaction of a demand of damages for waste, such delivery was good matter of satisfaction, upon the ground that such deed belonged to the feoffee, and not

(a) Cro Car. 441.

(b) Carthrew, 315.

(c) 3 Dyer, 277.

(d) Cro. Jac. 217

(e) Cro. Eliz. 356.

to the *cestui que use*; but in that case also it was not necessary to decide the point, as there were other grounds for the decision of the Court; and their opinion was in fact grounded upon the authority of the same case from *Dyer*.

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Although therefore the rule of pleading, which renders it unnecessary for the *cestui que use* to make profert of the deed under which he claims, has been conclusively established by the decisions in the several cases relied on, it is another question how far the doctrine that such deed belonged to the grantee or releasee to uses, which was assigned as a reason for those decisions, can be considered as also established by them. The soundness of that doctrine was questioned by Mr. Hargreave, in a *note* to a passage in *Co. Lit.* [6*a*], to which I shall presently refer, and also by Lord Hardwicke, in the case of *Whitfield v. Faussett* (*a*), where he states, with reference to it:—"I know not but when it is considered it may be called a spongy reason." And I think it will be found, upon consideration, that the doctrine thus questioned by these high authorities cannot be sustained.

There is no doubt that, under a conveyance of land at Common Law, either without warranty or with warranty only against the feoffor and his heirs, the ownership and property in the title-deeds was transferred, and went with the legal ownership of the lands, even though there was no express grant of such deeds in the conveyance. This doctrine was expressly laid down in the second resolution in *Lord Buckhurst's case* (*b*)—[reads it]—and also in the passage already referred to in *Co. Lit.* [6*a*], where it is stated that "The purchaser shall have all the charters and deeds *as incident to the land, and ratione terræ*, to the end that he may defend himself; for the evidences are, as it were, the sinews of the land; and the feoffor, not being bound to warranty, has no use of them." Such then having been the effect of a Common Law conveyance, in transferring to the feoffee or grantee of the land the ownership of the title-deeds, even though there were no express words granting them, what should be the effect of a conveyance under which, by the operation of the Statute of Uses, the legal estate in the lands passes

(*a*) 1 Ves. sen. 394.

(*b*) 1 Coke's Reports, p. 1.

E. T. 1862. to, and is vested in, the *cestui que use*? *Lord St. Leonards*  
*Queen's Bench* observes that—"This is a legislative conveyance to the *cestui que*  
MALONE "use, as powerful as the Common Law conveyance to the feoffee to  
v.  
MINOUGHAN. "uses; and as the latter conveyed to him the right to the deeds,  
"although they were not granted to the former, ought to have as  
"powerful an operation in transmitting them with the estate from  
"him to the *cestui que use*."\* And I not see upon what ground it  
can be reasonably contended that the right to the deeds should not  
pass with the land in the one case to the *cestui que use*, as well as  
it would in the other to the feoffee or grantee to uses. It is clear  
that, under a conveyance in which there is no reference whatever to  
the title-deeds, the right of the grantee of the land to such deeds  
would be only as incident to the estate he thereby acquired in the  
land. If, however, by such a conveyance the legal estate in the  
land, to which such right is incident, was, by the operation of the  
Statute of Uses, vested, not in the grantee or releasee to uses, but in  
the *cestui que use*, can it be said that such grantee or releasee would  
still acquire the same right to the deeds as he would have done if  
such estate had vested in him? Would it not be more reasonable to  
hold that, as the Statute of Uses transferred to the *cestui que use* the  
legal estate in the land, it also transferred to him such right to the  
deeds as was incident to that estate? Otherwise, the effect of the  
statute on such a conveyance would be, that the right to the title-  
deeds, which was incident to and should pass with the land, would,  
without any words of grant, be transferred, not to the party who  
took the legal estate in the land, but to one in whom no such estate  
was vested. Such a doctrine would be attended in practice with  
many inconvenient and embarrassing results. Persons who are  
merely releasees to uses in a settlement or other conveyance of lands  
are considered as mere formal parties, taking no estate or interest  
whatsoever in the lands. It generally happens that the conveyance  
either contains no express grant of the title-deeds, or grants them to  
the releasees along with the lands. Supposing the land to be subse-  
quently resettled, then, according to the usual course of proceedings,  
the releasees to the former settlement would not be made parties to

\* Sugden's Vendors and Purchasers, 13th ed., p. 366.

the subsequent one ; but they would, as contended for by plaintiff's Counsel, continue to be the rightful owners of the title-deeds, while such deeds would be actually delivered over to those who derived under the subsequent settlement. Suppose, again, that it should be necessary to bring an action to recover possession of the title-deeds, either from the grantor in any settlement, or from any other party who had wrongful possession of them according to the arguments of plaintiff's Counsel, such action should be brought by the releasees or the survivor. If, however, as suggested during the argument, they were both dead, should the action be brought in the name of the heir or executor of such survivor ? Where, under a Common Law conveyance, the feoffees to uses took the legal estate in the land, such estate, and the right to the title-deeds as incident thereto, would descend to the heir of the surviving feoffee ; but how could that principle be applied in the case of releasees to uses who took no estate whatever in the land ? No instance has been cited of any such action having been brought by a mere releasee to uses, or by his heir or executor, and I believe that none can be found.

With respect to the cases which have been so much relied on by plaintiff's Counsel, the actual decisions in them were, as I have already observed, upon that general rule of pleading which required a party to make profert of the deed under which he claimed. In a Common Law conveyance to uses it was the feoffee or grantee who alone took the legal estate in the lands, or could enforce any legal right thereunder ; and it was to him alone that the deed of conveyance belonged as incident to the land ; and if, in his pleading, he relied on such deed, he was bound, according to the rules of pleading at Common Law, to make profert of it. But in a conveyance where, by the statute, the use was executed in the *cestui que use*, it was he, and not the feoffee or grantee, that acquired any estate in the land, or any right of action respecting it ; and the rule that the statute did not also transfer to the *cestui que use* the obligation of making profert of such conveyance, might have been established, not merely on the supposition that such conveyance did not belong to him, but also on the ground that the statute did not profess to deal with this rule of pleading, or to impose such obligation upon him ; and that,

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as already stated, he was *in by the law*, and by the operation of the statute, and not by the intrinsic force of the deed itself. We have been referred by plaintiff's Counsel to the case of *Jenkins v. Peace* (a), in which it was held that, in pleading a conveyance by lease and release, profert should be made of the release. It is true that Lord Abinger, in his judgment, when referring to the rule that the *cestui que use* in a deed need not make profert of it, states his opinion that such rule was established, on the ground that the feoffee, and not the *cestui que use*, was presumed by law to have possession of the deed; but he also expressly states that the result of the case before them would be the same, even if such rule was grounded on the other principle referred to, namely, that the *cestui que use* was in by the operation of law. The *actual decision* in that case does not therefore affect the question now before us. But even supposing that this, and the several other authorities relied on by plaintiff's Counsel, should have established the principle that, for the purposes of a technical rule of pleading, a deed conveying land to a releasee to uses should be considered as belonging to him, and not to the *cestui que use*, it does not, I think, follow that we should adopt that principle in a case where the question of the rightful ownership of that deed is directly raised; still less that we should adopt it in a case like the present, where the question arises as to the ownership, not of the conveyance executed to the releasee, but of the title-deeds under which the lands comprised in such conveyance were held by the grantor. It appears to me that we could not do so consistently with the well-established principle of law which I have already mentioned, namely, that the right to the title-deeds passes with the land itself, even without any express words of grant.

This latter principle, which was so clearly laid down in *Lord Buckhurst's case*, and in the passage above cited from *Co. Lit.* [6 a], has been also recognised and acted on in several more recent cases, to some of which it will be sufficient to refer. In *Hooper v. Ramsbottom* (b), Gibbs, C. J., states, as a general rule, that the person entitled to the land has a right also to the title-deeds of the

(a) 6 M. &amp; W. 722.

(b) 2 Taunt. 12.

land. In *Phillips v. Robinson* (a), Best, C. J., states it to be a clear principle of law that the muniments of an estate belong to the person who has the legal interest in it. In *Harrington v. Price* (b), Lord Tenterden also declares it to be an established principle that whoever is entitled to the land has also a right to all the title-deeds affecting it. And similar principles are laid down in the two cases of *Newton v. Beek* (c) and of *Goode v. Burton* (d), to which we were referred in the argument. In all these cases, actions of trover or detinue were brought for the recovery of the title-deeds; so that the question of the right of property in them directly arose; and it will be observed that they were all decided without reference to the fact whether or not the deeds were granted by express words; which, in most of those cases, does not appear to have been done.

It is true that the question, as between the right of the *cestui que use* and that of the grantee or releasee to uses, did not arise in any of the foregoing cases; but there are two other cases the facts of which directly called for a decision of that question, if it had been raised. The first of these cases is *Lord v. Wardle* (e), which was an action of trover, for a deed whereby certain land was conveyed by plaintiff's father to W. Wilkins, in trust for the plaintiff. It appears from the case that Wilkins was merely a grantee or releasee to uses; and that, by the deed, the legal estate was transferred to, and vested in, the plaintiff, as *cestui que use* under the statute. The defendant was the attorney who prepared the deed; he had retained the possession of it from the time of its execution; and, by one of his pleas, denied that it was the property of the plaintiff. One question in the case was, whether, as the deed was executed for the mere purpose of giving plaintiff a game qualification, any estate or interest in the land actually passed by the deed. And this was considered by the Court to be the question upon which the plaintiff's right to the deed depended. Tindal, C. J., stated, in his judgment:—"If the property conveyed passed by the deed in question, the deed itself belonged to the son." It was not

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(a) 4 Bing. 106.

(b) 3 B. & Ad. 172.

(c) 3 H. & N. 220.

(d) 1 Exch. Rep. 191.

(e) 3 Bing. N. C. 680.

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suggested, either by the Counsel or the Court, that Wilkins was entitled to it, as he would have been according to the doctrine now contended for by plaintiff's Counsel; and, if such doctrine had been established by authority, its application to the facts of that case could scarcely have escaped the attention of the Court; whereas the judgment of Chief Justice Tindal is altogether at variance with it. The other case is that of *Davies v. Vernon (a)*, which was also an action of trover, for the title-deeds of lands which, by a settlement executed on plaintiff's marriage, had been settled upon her husband for life, with a joint power of appointment to her and her husband. The husband afterwards deposited the title-deeds with defendant, as a security for money; and he and his wife subsequently executed their power of appointment, by a deed in which the power of appointment was given to the survivor. The plaintiff, after her husband's death, executed that power, by appointing the lands to herself in fee; and then brought her action for the deeds, in which she obtained a verdict. There was a motion for a new trial, on the ground (amongst others) that plaintiff was not entitled to the deeds; but the Court confirmed a new trial. It may be assumed, from the nature of the settlement, as stated in the case, that the lands were thereby conveyed to some other parties, as releasees to uses; so that the plaintiff's claim to the title-deeds was as *cestui que use* of the lands: and yet the right of the plaintiff was not disputed on that ground, although, according to the doctrine now contended for, such an objection would have been decisive against her. The case appears to have been much considered by the Court; and it is difficult to suppose that the objection, if well founded, would not have been noticed in the argument, or in the judgment of the Court.

For the foregoing reasons, I am of opinion that the lease in question was not the property of the plaintiff; and that accordingly the finding of the jury on the second issue, for the defendant, should not be disturbed. This entitles defendant to the verdict in the action; although, upon the first issue (respecting the detention of the lease), a finding should be entered for the plaintiff; as we are all

(a) 5 Q. B. 244.

of opinion that, though defendant had in his possession only parts of the lease, the detention of those parts entitled the plaintiff to succeed on that issue.

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LEFROY, C. J.

I concur with my Brothers O'BRIEN and FITZGERALD, who have gone so fully and accurately into the authorities cited on both sides, that it would be mere repetition on my part to go through them again. There is however one additional authority to which I should wish to refer,—a decision of Lord Redesdale, a Judge whose mind appears to have been equally stored with the soundest principles both of Law and Equity. In the case of *Bowles v. Stewart* (a), he stated distinctly that the possession of the title-deeds is the result of, and correlative to, the title to the estate; that the title to the estate draws with it the title to the deeds. I think it right also to make an observation on the case of *Jenkins v. Peace*, which has been cited as a case in which the Court acted upon the principle of requiring profert; and from which it was sought to be inferred that a mere releasee to uses has such a title as gave him the custody of the deed. But, when that case comes to be examined, it will be found to be in perfect harmony with the decision at which the majority of this Court has now arrived. That case was an action of trespass, for breaking and entering the plaintiff's land, and digging mines therein; but made no statement or profert of the deed under which he derived his title; he went merely on his possession. The defendant justified, as to the digging for and working the mines, by setting out a conveyance of the lands by lease and release, operating under the Statute of Uses, but containing a reservation of the mines to the grantor, under which reservation he (defendant) showed an authority to dig for and work the mines, but made no profert of the deed containing the reservation; for want of which a special demurrer was taken to the justification. The defendant insisted that he was not bound to make profert of the deed, as it was a conveyance under the Statute of Uses; but the Court held that whatever might be the operation of the statute as to the conveyance

(b) 1 Sch. & Lef. 209.

E. T. 1862. of the land, it had no effect in respect to the reservation under  
*Queen's Bench* which the title to the mines was claimed; as the deed operated,  
**MALONE** as to that, on the principles of the Common Law; and that it was  
*v.* necessary to make profert of the deed, to satisfy the Court that  
**MINOUGHAN.** it contained the reservation. But they said nothing to countenance  
the principle that the releasee to uses was the proper party to have  
the custody of deeds operating under the statute.

I will now close with the case with which perhaps I should have begun—*The Lord Buckhurst's case* (a). In that case the Court distinctly held that the grant of the estate carried with it the right and title to the deeds, although, as the case says, "they be not granted by express words;" and though the conveyance be left wholly without a word as to the granting of the deeds, yet the grant of the estate carries with it the right to the muniments of the estate. That case was decided by the most eminent men of the law then living—by Anderson, C. J., Popham, C. J., and Garody, J.; and is an authority which has ever since been, as I would say, the polar star by which the doctrine as to the title to the deeds, resulting from the title to the estate, has been guided. With respect to the necessity of making profert, whatever difference there may have been, there has been none, as I conceive, with respect to this great principle now at issue—namely, that the title to the estate carries with it the title to the deeds. The cause shown must therefore be allowed, with costs.

(a) 1 Rep. 1.

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## APPENDIX.

### HAWKINS v. M'LOUGHLIN.\*

(Exchequer.)

1851.  
*Exchequer.*  
June 5.

UPON a civil-bill, by the Clerk of the Peace of the county Wexford, against M'Loughlin, for a fee of 2s. 6d., upon the renewal of the latter's license as a publican, the Chairman, at the October Sessions 1849, gave a decree for the amount claimed. The respondent appealed; and, at the Spring Assizes for the county Wexford, 1850, Torrens, J., reversed the decree: *M'Loughlin, appellant; The Clerk of the Peace of the County Wexford, respondent (a)*. The Clerk of the Peace proceeded by civil-bill for the same amount at the following October Sessions, for the renewal of the respondent's license for 1850. The Chairman dismissed the civil-bill, stating that he was bound by the ruling of Torrens, J. From that dismiss the Clerk of the Peace appealed. At the Spring Assizes for the county Wexford, 1850, Pennefather, B., declined to decide the question; but advised a special case to be stated, for the opinion of the Court of Exchequer. This was done, by consent; and a special case was drawn up, in the nature of an action for debt, in which Hawkins the Clerk of the Peace was plaintiff, and M'Loughlin was defendant.

The case came before the Full Court of Exchequer in Trinity Term 1851.

*W. M. Gibbon* (with whom was *G. Fitz Gibbon*), for the plaintiff, contended that he was entitled to a fee of 2s. 6d. upon each renewal of a publican's license, as well as upon the original issuing of it. He cited 10 & 11 *Car.* 1, c. 5, and 3 & 4 *W.* 4, c. 68, ss. 2, 6, and 10.

*D. Lynch* (with whom was *A. Hickey*), for the defendant, con-

(a) 2 Ir. Jur. 168.

Clerks of the Peace are entitled to a fee of 2s. 6d. upon every renewal of a publican's license—3 & 4 *W.* 4, c. 68, ss. 2, 6, 10. *M'Loughlin, appellant, the Clerk of the Peace of the county Wexford, respondent* (2 Ir. Jur. p. 168), overruled.

\* I am indebted to W. M. Gibbon, Esq., one of the Counsel in the case, for calling my attention to this very important decision, hitherto unreported.—REPORTER.

T. T. 1851. tended the plaintiff was entitled to a fee only upon the first issuing  
*Exchequer.* of the license. The express declaration, in the 12th section of the  
 HAWKINS statute, that the Clerk of the Peace in the city of Dublin should  
 v. be paid a fee of 2s. 6d. upon each renewal, as well as upon the first  
 M'LOUGHLIN grant of a license, made it manifest that the Clerk of the Peace was  
 not entitled to receive a fee upon a renewal in any other part of  
 Ireland.

The subject too should not be taxed, unless a tax was imposed by  
 clear and unambiguous expressions.

*G. Fitz Gibbon* was not called upon.

The LORD CHIEF BARON delivered the unanimous judgment of  
 the Court; and stated that they were of opinion that the Clerk of  
 the Peace was entitled to a fee of 2s. 6d. upon the issuing of each  
 license, although such license may be only a renewal of a license  
 granted in a previous year.

The words of the statute were plain—viz., that within six days  
 after the obtaining of the license, certain particulars should be fur-  
 nished to the Clerk of the Peace, who was to be paid 2s. 6d. for  
 making an entry of those particulars. Certain entries had to be  
 made by the Clerk of the Peace, both when the license was first  
 granted, and when a renewal thereof was obtained; and, in the  
 opinion of the Court, the plaintiff's right to a fee of 2s. 6d. was  
 not limited, by the language of the statute, to the first case only.  
 Judgment must be entered for the plaintiff, but without costs, as  
 there had been a decision in favor of the defendant.

The following is the Curial portion of the order :—

It is ordered by the Court, that the point stated in the special  
 case be ruled in favor of the plaintiff; and accordingly, by  
 consent, that judgment be entered for the plaintiff for 2s. 6d.  
 debt; without costs; without further motion.

*Rule Book, Trinity Term 1851.*

M. T. 1863.

Exchequer.

## VANSTON v. SYMES.—WYNNE v. VANSTON.\*

Nov. 24.

IN this case, all the goods of the defendant had been seized by the Sheriff of the city of Dublin, under a *fi. fa.* Wynne, who claimed all the goods of the defendant under a bill of sale, lodged a claim, as did also Stapleton under a second *fi. fa.* Upon the 21st of August 1863, the Sheriff obtained an interpleader order, and was directed thereby to sell the goods seized, Stapleton undertaking to abide the result of the issue. The interpleader issue of *Wynne v. Vanston* was tried before O'Brien, J., at the Consolidated Nisi Prius, during Michaelmas Term 1863. The gross amount realised by the sale was £334, and upwards. The jury found that the goods specified in the schedule to Wynne's bill of sale belonged to him; and that goods, which realised the sum of £23. 16s. 8d., the produce of goods in the possession of the execution debtor, not included in the bill of sale, belonged to Vanston. The Sheriff brought £312. 16s. 10d. into Court, having made certain deductions for expenses and fees.

*M. Morris* (with whom was *O'Driscoll*), on behalf of Wynne, now moved that, of the money in Court, the sum of £310. 16s. 4d. should be paid to him; and that Vanston should pay Wynne's costs of the interpleader order, of trial of the interpleader issue, and of this motion.

*Dowse* and *Palles*, for Vanston, contended that he was entitled to a proportion of the costs of the interpleader order and trial; as he had succeeded at the trial, so far as regarded the goods not included in Wynne's bill of sale: *Lewis v. Holding* (a); *Walker v. Olding* (b); 2 *Chitty's Arch. Prac.*, p. 1325.

*H. Devitt* appeared for the Sheriff.

FITZGERALD, B.

Wynne substantially succeeded at the trial of the interpleader issue, therefore he is entitled to the costs of the interpleader order

titled—the Sheriff to have his poundage only upon the sum to which the execution creditor was found to be entitled.

\* *Coram* FITZGERALD, HUGHES, and DEASY, BB.

(a) 2 M. & G. 875.

(b) 9 Jur., N. S., 53.

A Sheriff having seized goods under a *fi. fa.*, a claim was lodged by the holder of a bill of sale. The interpleader order directed the goods to be sold, and their produce to be lodged in Court, pending the trial of the issue. The jury found that all the goods seized were included in the bill of sale held by the plaintiff, save goods of the value of £23.—*Held*, that the plaintiff in the interpleader issue was entitled to the costs of the interpleader order and issue, and also to draw the amount produced by the goods covered by his bill of sale, free of Sheriff's poundage; that the plaintiff and the defendant in the issue should pay the Sheriff the expenses of the sale in the proportion to the sums to which they were en-



M. T. 1863. Exchequer.  
 VANSTON  
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and of the trial; save such costs as were incurred by reason of his claiming the goods which the jury found were not included under his bill of sale.

The following was the Curial part of the order made:—

The Court doth hereby declare the said Sheriff of the county of the city of Dublin entitled to, the sum of £12. 17s. 4d., for the expenses attending the sale of the goods and chattels directed by the said order of the 21st of August 1863; and also declare that the said Sheriff is only entitled to the sum of £1. 4s. 0d. as and for his poundage on the sum of £23. 16s. 8d., the amount applicable to the execution in this cause. And it is ordered by the Court that the said Sheriff do refund to the said J. D. Vanston the sum of £7. 8s. 0d., being the sum retained by him for such poundage, and the said sum of £1. 4s. 0d.; and that the said E. Wynne and J. D. Vanston do pay the amount of the expenses of the said sale, in the proportion of the amounts of the proceeds of the sale to which they are respectively entitled. And the said E. Wynne having obtained a verdict on the trial of the said issue for the goods and chattels, to the amount in value of the sum of £310. 16s. 4d., and being liable, as aforesaid, to pay to the said sheriff £12, as his proportion of the expenses of the said sale, it is further ordered that the Master of this Court do draw on the Bank of Ireland, in favor of the said E. Wynne, for the sum of £298. 16s. 4d., being the amount of the said verdict, less by the said sum of £12; and that the said Master do also draw on the Bank of Ireland, in favor of the said J. D. Vanston, for the balance of the said sum of £312. 13s. 10d., so lodged in Court, the said J. D. Vanston undertaking to pay the said Sheriff 17s. 4d., his proportion of the expenses of the said sale. It is further ordered that the said J. D. Vanston do pay to the said E. Wynne his costs of the said order of 21st August 1863, and the general costs of the said issue (save so far as they relate to, or were occasioned by, his claim to goods found on the said trial not to have been included in his bill of sale), together with the costs of this motion; and that the said J. D. Vanston do also pay to the said Sheriff the costs to which he is declared entitled by the said order of the 21st of August; and that Sarah Stapleton, in said order mentioned, do pay to the said Sheriff his costs of the motion in the case of *Stapleton v. Symes*.

*Appendix.*

v

M. T. 1861.  
*Queen's Bench*

O'BRIEN v. TAGARET.\*

*(Queen's Bench).*

Nov. 25.

MOTION to set aside the defence filed by the defendant, as being false and sham, and filed solely for the purpose of delay.

Where a defendant pleads a single defence, traversing a material fact in the plaint, the Court will not try its truth or falsehood on affidavit.

The plaint contained only one paragraph—"That the plaintiff let to the defendant all that and those, &c., to hold for twenty-one years from the first of November 1855, at the yearly rent of £200, payable half-yearly, of which rent a sum of £100, being one half-year's rent, is still due and unpaid."—Defence: "That the plaintiff did not let to the defendant the lands in the plaint mentioned, or any or either of them, or any part thereof as alleged." It appeared by the affidavit of the attorney for the plaintiff, filed in support of the present motion, that by an indenture of lease dated the 17th of November 1855, the premises mentioned in the summons and plaint were demised by the plaintiff to the defendant, for a term of twenty-one years, from the 1st of November then instant, at a rent of £200 a-year; and that the said premises were held and enjoyed by the defendant, under the said lease, until the 1st of November in the present year: that the deponent, as agent of the plaintiff, received from the defendant several half-yearly gales of the rent reserved by the said lease; and that on several occasions he was obliged to take, and did take proceedings, on behalf of the plaintiff, by writ of summons and plaint, for the recovery of certain other half-yearly gales of the same rent, and that he had much difficulty in obtaining payment thereof, in consequence of the defendant on such occasions seeking time for payment, but not filing any defence: that in the case of the half-year's rent which became due on the 1st of May 1861, for the recovery of which a summons and plaint had been filed, a consent for judgment was signed by the attorney for the defendant, who was also his attorney in this action; and the deponent believed that the defence in the present action was filed solely for the purpose of delay, and was utterly false. It was mentioned by Counsel for the plaintiff, during the argument, that the several writs of summons and plaint filed for the purpose of recovering the half-yearly gales of rent were, in terms, the same as the plaint in the present case.

\* Before the Full Court.

M. T. 1861.  
*Queen's Bench*  
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*Brady*, in support of the motion.

No affidavit has been filed by the defendant to support his plea: *Stokes v. Hartnett* (a). The falsity of this plea is manifest; the defendant has paid several gales of rent to the plaintiff, some of them under pressure of actions, in which the same attorneys were employed by the parties as appear now on the record; and yet the defence is "that the plaintiff never demised the lands as alleged."—[LEFROY, C. J. *Non constat* but that may be the fact. Might not the defendant have pleaded *non est factum*?—O'BRIEN, J. Suppose before the Common Law Procedure Act you had declared on this demise, and the defendant had pleaded the general issue, could you have sustained such a motion as the present?—LEFROY, C. J. Or suppose that in declaring on this lease you had misdescribed it; would not this plea be admissible?]

*Beytagh*, in support of the plea.

In the case of *O'Donnell v. Reilly* (b), Pigot, C. B., reviewed the authorities upon this subject, and showed that in every one of them there was the additional element of irregularity. As to the practice before the Common Law Procedure Act, see 1 *Ferg. Prac.*, p. 268.

No new matter has been introduced into this plea; the defendant has done nothing but traverse a material averment in the plaint, and he has a right to do so. He cited *Nutt v. Rush* (c); *Bartley v. Godslake* (d); *La Forest v. Langan* (e).

LEFROY, C. J.

It would be stretching a rule which has been long and wisely acted upon by the Superior Courts, if we were to accede to this application; and it would be stretching it in order to make it applicable to a case of a very different character from that for which the rule was originally introduced and acted upon. That rule is this, that a defendant shall not, by setting up a mere sham defence, of the insufficiency and falsity of which there can be no doubt, obstruct a plaintiff in the trial of his case. It is now sought to carry that rule to this length, that the Court is to try here on affidavit the issue between the parties. Now the Court will do no such thing. Matters of fact in dispute between the parties are to be tried upon a traverse by a Judge and jury; or if there be new matter of defence which may avoid the cause of action, the

(a) 10 Ir. Com. Law Rep., *App.*, 20.

(b) 11 Ir. Com. Law Rep. 329.

(d) 2 B. & Ald. 199.

(c) 4 Exch. 490.

(e) 4 Dowl. Pr. C. 642.

defendant may confess and avoid by alleging that new matter; and if that new matter be of such notoriety and falseness that it deserves the appellation of a sham plea, the Court will deal with it as such. As for instance, if a defendant says in Court, in answer to an action, that there is a judgment recovered in the same Court upon the same subject-matter, and pleads that in avoidance of the action; such a plea, if untrue, would be a false and sham plea upon which the Court would act. In such a case the Court itself has the means of ascertaining whether it be a sham plea. And so in like manner if the defence be pleaded in such a way that there is on the face of it, in point of law, an absurdity,—a defence which could not admit of argument for a moment,—the Court will set such a defence aside; and carry out in the case of these latter defences the same principle as that applied to pleas false in fact, and treat them as legal shams,—pleas false in law. But that is not to interfere with the right of the defendant to traverse a substantive allegation in the summons and plaint: he has a right to have the truth of that allegation tried in the ordinary way by a jury, and not upon affidavit. The plaintiff has no right to compel the defendant to support the allegations in his defence by an affidavit; nor can the defendant by a motion compel the plaintiff to make an affidavit to show that the facts stated in his plaint are true. Here certain particular matters are stated in the plaint which we are bound *prima facie* to take as true. If they are not true the defendant may traverse them, but is not bound to make an affidavit, and the traverse will be tried in the usual manner. It appears to me that this case, in every view we can take of it, does not come within the principle of those cases in England. I have stated already the principle on which the Court will act in applications of this kind, and they are also stated particularly by Pigot, C. B., in the case of *O'Donnell v. Reilly* (a); and this Court has decided nothing contradictory of those principles, nor does it claim any jurisdiction to try the rights of parties upon affidavit, nor insist on a defendant sustaining his pleading by affidavit where the Legislature has not required it. The Court may give a party liberty to make an affidavit to do away with a strong suspicion that his plea is false and sham; but our decision in the case of *Banks v. Jordan* (b) has been very much mistaken if we can be supposed to have intended to carry that case beyond what the authorities warranted. Therefore, so far as my opinion goes, the motion must be refused.

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*Queen's Bench*  
**O'BRIEN**  
**v.**  
**TAGARET.**

(a) *Ubi supra*.

(b) 7 Ir. Jur., N. S., 28.

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*Queen's Bench*  
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O'BRIEN, J.

I concur in the judgment pronounced by my LORD CHIEF JUSTICE. The present application is somewhat analogous to the case of a motion made, in an action of covenant, before the passing of the Common Law Procedure Act, to take off the file a plea of "*non est factum*," on the ground of its being false; and no instance has been shown in which such an application was granted. With respect to the jurisdiction exercised by Courts of Law, in taking pleas or defences off the file, there is a clear distinction between those cases where defendant by his plea merely traverses a material averment in the summons and plaint, and those cases where defendant states substantive new matter as a defence. In the latter class of cases the Courts have frequently set aside a plea, on the ground of its being manifestly either false or a sham plea; but in the latter class of cases, it is considered that defendant is entitled to put plaintiff upon proof of his case. That is all which has been done in the present instance; and, as a general rule, the Courts will not decide upon affidavits as to the proof of the plaintiff's case. It might perhaps be expedient that similar provisions to those of the Act of last Session, relating to defences to actions on bills of exchange, should be enacted as to cases like the present; but until that be done, we cannot interfere, as required by the present application.

HAYES, J., concurred.

FITZGERALD, J.

I also concur in the decision of the Court. Long before the passing of the Common Law Procedure Act, every one of the Superior Courts disclaimed the right of trying merely the truth of a defence on affidavit. To have done so, would have been to usurp the province of the jury. There were numerous instances, under the old system, of applications similar to the present; but the Court always required something to be proved, beyond mere abstract falsity, in order to induce its interference. When the Common Law Procedure Act came to be introduced in Parliament, if my memory does not fail me, two things were proposed—one, that the plaintiff should verify his plaint; the other, that the defendant should verify his defence. Neither of these propositions however was adopted; and we must therefore take the Act as we find it. The plaint may be perfectly false; but I have yet to learn that we are to try the truth of it on affidavit. The defendant is left equally at large by the Legislature, in his abstract right of pleading, except in one instance, namely, when he is obliged to

come to the Court for liberty to plead several matters. In that case the Legislature has said that, if he be obliged to come to the Court for that purpose, it must be upon a general affidavit that his pleas are true in substance and in fact; and, should the defendant obtain that liberty, and it appear afterwards that his pleas are false, it might be that the Court, in such a case, would interfere, by discharging the rule to plead. But, where the defendant pleads a single defence, there is nothing in the statute requiring him to verify his plea; and it appears to me that the Legislature has acted wisely in thus leaving the defendant at large. There are many cases where the defendant could not, in point of law, raise the real question between the parties, except by a traverse of a material allegation in the summons and plaint. Various questions might arise which might, and properly should, be raised by a traverse in terms; as, for instance, if in the present case the effect of the alleged demise was to be questioned. Under the 83rd section of the Common Law Procedure Act 1853, if the pleading be so framed as to embarrass, the Court will set it aside, upon an application by affidavit; and if the Legislature intended that the Court should have that general power contended for here, why did not that section go on, and say, that if the defence be manifestly false, the Court shall set it aside? It appears to me that, as the Legislature have confined the power of the Court to those three cases, where the pleading is so framed as to *prejudice, embarrass, or delay* the fair trial of the action, they never could have contemplated that we should have the power of setting a defence aside merely because it was contrary to the truth; and the old rule has been left untouched, that we are not to try the truth of a defence on affidavit. I agree with the decision of the Court of Exchequer, in *O'Donnell v. Reilly* (a); and my recollection is, that the same point was solemnly decided in the Court of Common Pleas, and that that Court came to a similar conclusion.

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*Queen's Bench*  
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Motion refused.

(a) 11 Ir. Com. Law Rep. 329.

M. T. 1862.  
*Queen's Bench*

JAMES ROBINSON FAYLE v. THE KINGSTOWN  
 WATERWORKS COMPANY.\*

Nov. 5, 6.

*After a Company had ceased to exist, a member of it instituted against it an action. The Court refused to substitute service of the summons and plaint on two gentlemen, one of whom had been the attorney, and a director of the Company, and the other of whom had been its secretary.*

THIS was a motion on behalf of the plaintiff, to make absolute a conditional order, dated the 11th of June 1862, for the substitution of the service of the writ of summons and plaint on "Richard "Deane Kane, who *was* the attorney, and also a director, of said "Company, and on Thomas Henry Kane, who *was* appointed the "secretary of said Company."

The action was brought to recover damages, by reason of the Company not having inserted the plaintiff's name in the register of shareholders; and the writ of summons and plaint in each paragraph also claimed a writ of *mandamus*, to compel the Company to insert the plaintiff's name in the register of shareholders.

The conditional order had been obtained on the affirmation of the plaintiff, which was made on the 7th of June 1862, and in which he stated—That he signed the subscription contract; that, in the year 1861, the Corporation of Dublin agreed to purchase the waterworks of the Company for a sum of £5850; that, towards the close of the year 1861, he applied to be allowed to see if his name had been duly registered as a shareholder, but was refused all information, save that he was not then, nor ever had been, a shareholder in the Company; that he thereupon procured from London a copy of the subscription list, wherein his name was duly entered, and he thereupon, on the 17th of January 1862, wrote a letter, requiring to be allowed to see the shareholders' address-book, but got no answer; that his solicitors, in May 1862, applied to Mr. R. D. Kane, the Company's solicitor, for an undertaking to appear and defend, but were informed, in reply, that the Company had been dissolved; that a copy of the plaint was afterwards served on Mr. T. H. Kane, as secretary of the Company, who replied that the Company had been long extinct, and that he had been, but was not then, its secretary; that this conduct of the Messrs. Kane was only a pretext, to prevent the plaintiff proceeding with this action; and that it was in pursuance of a plan entered into between Mr. R. D. Kane and two others of the directors, to secure the entire assets of the Company to themselves and some of their immediate friends, and to retain the sum of £5850, although the Company had never incurred any expenses, except in obtaining its Act of incorporation.

\* Before the Full Court.

Mr. R. D. Kane filed an affidavit as cause, and stated therein that there was no such plan as that charged by the plaintiff; and that, after payment of expenses, the balance of the purchase-money had been apportioned among the registered shareholders, in pursuance of the provisions of the 23rd section of the 25 & 26 Vic., c. 105, *Loc. & Pers.*, at the rate of 12s. 6d. per share; that the plaintiff did sign the subscription contract for the sum of £150, professing to have paid up thereon £15, but that he paid no money, and, before executing the subscription contract, obtained a written indemnity to protect him from liability; that the plaintiff never applied for or took any shares in the Company, nor paid any money towards the undertaking; that the Company obtained, in 1861, a second Act, which contained a section enabling them to carry out an agreement to sell the undertaking to the Corporation of Dublin, who, in their Act (25 & 26 Vic., c. 172, *Loc. & Pers.*), inserted a clause enabling them to purchase the Company's undertaking; that, all requisite preliminaries having been complied with, on the 20th of January 1862, a conveyance of the undertaking of the Company was duly executed, under their common seal, to the Corporation of Dublin, pursuant to the 25 & 26 Vic., c. 105, *Loc. & Pers.*, s. 20, and the 25 & 26 Vic., c. 172, *Loc. & Pers.*, s. 74; whereupon the Company became dissolved and ceased to exist, pursuant to the 25 & 26 Vic., c. 105, *Loc. & Pers.*, s. 21; and that he believes the deed of conveyance was duly registered.

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*Heron* and *P. Martin* moved to make the conditional order absolute, notwithstanding the cause shown.

The cause shown is, that the Kingstown Waterworks Company has ceased to exist, under the 24 & 25 Vic., c. 105, *Loc. & Pers.*, ss. 20, 21, and the 24 & 25 Vic., c. 172, *Loc. & Pers.*, s. 75. But the Company still exists, so far as regards liabilities existing prior to the execution and delivery of the deed of transfer; because its liabilities were not transferred to the Corporation, from the 75th section of whose Act that word has been omitted. Section 77 clothed the purchase-money with a trust; and the plaintiff swears that he is a *cestui que trust*.—[FITZGERALD, J. That section constituted the directors trustees of the purchase-money for the shareholders, and the plaintiff may file a bill in equity against them.]—No; because the defendants refuse to register him as a shareholder, in which character alone he could file a bill. The service which we seek to effect is good service: *Gaskell v. Chambers* (a). The question, whether the Company has got rid of its liabilities, ought

(a) 26 Beav. 252.



M. T. 1862. not to be disposed of on this motion.—[FITZGERALD, J. That  
*Queen's Bench* question we must decide on this motion. If we substitute service  
 FAYLE on the defendants, and compel them to appear in their corporate  
 v. capacity, we cannot afterwards allow the question to be raised.]—  
 KINGSTOWN Section 75 of c. 172, overrides section 21 of c. 105, which dissolved  
 WATER. CO. the Company on the execution and delivery of the deed.—[FITZGERALD, J. The two Acts must be taken together, as forming the contract.]—But, the word “liabilities” having been omitted from c. 172, the Corporation cannot be made responsible for the liabilities of the defendants.—[HAYES, J. The plaintiff's case is, that he is, and was from the first, a shareholder; so that he was an assenting party to the contract.]—No; for, not having been registered, he was not allowed to vote at the meeting. The plaintiff signed the subscription contract, and remains liable on it, notwithstanding the dissolution of the Company: *The Thames Tunnel Company v. Sheldon (a)*; *Nixon v. Brownlow (b)*: he is therefore entitled to be registered. After a partnership has been dissolved, the members of it must still be sued by the style of the firm.—[FITZGERALD, J. The distinction between the two cases is, that the *personal* liability of partners continues after the dissolution of the partnership; but in this case a *personal* liability never existed, and the *Company* has been dissolved.]—The dissolution of the Company does not prevent it being liable, as such, for liabilities which have not been transferred: *The Guardians of Woodbridge Union v. The Guardians of Colneis Union (c)*.—[FITZGERALD, J. There is another difficulty in your way. The Common Law Procedure Amendment Act (*Ir.*) 1853, s. 33, prescribes a particular mode of serving an existing Company. If the defendants are an existing Company, the service already effected is good, under that section. If the Company has ceased to exist, you will require some authority to show that we have power to substitute service on it, as such.]—That section does not oust the general jurisdiction of the Court.

*Whiteside, S. Ferguson, and Boyd, contra.*

The plaintiff refused even to sign the subscription contract until he had received a written indemnity against all liability; he never paid a farthing to the Company; and never was registered; so that he never was a shareholder at all. If he was a shareholder, then he is precluded from suing the Company, because, as a member of it, he must be taken to have consented to the execution of the conveyance.

(a) 6 B. & Cr. 347.

(b) 2 H. & N. 455.

(c) 13 Q. B. 286.

His remedy, if any, is to be obtained in the Court of Chancery, against the trustees of the purchase-money. In *Gaskell v. Chambers* the Company had not been dissolved at all. In *Nixon v. Brownlow* the defendant was a registered shareholder; and in *The Guardians of Woodbridge Union v. The Guardians of Colneis* the Act had preserved the rights of third persons who had not given a written consent to the dissolution of the Union. A Company once dissolved as this one has been is dissolved for all purposes: *Grant on Corporations*, p. 303. If this Company is now in existence, the Common Law Procedure Amendment Act (Ireland) 1853, s. 33, points out the manner in which it is to be served. If the Company is not now in existence, the Court has not any jurisdiction to order the substitution of service on it.

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*P. Martin*, in reply.

If there be any doubt whether the Company has ceased to exist, the plaintiff should get the benefit of that doubt; for otherwise he will be for ever concluded; whereas if this motion is granted, the defendants may raise the objection under a plea that the Company has ceased to exist. Chapter 105 gave the Company power to agree with the Corporation for a sale of their concern; but that agreement was strictly defined in the Act; and one of its terms was, that the liabilities of the Company should be transferred to the Corporation. If that had been done, a creditor of the Company might have sued the Corporation. But the transfer has taken place under c. 172 only, so that the liabilities of the defendants have not been transferred to the Corporation.—[O'BRIEN, J. I have the deed now before me, and it is expressly made under both Acts.]—But the Corporation had no power to buy except under c. 172. The Acts were not meant to be construed together, for c. 105, s. 22, and c. 172, s. 76, are almost word for word the same. The section of the first Act would not have been re-enacted *verbatim* if the two Acts were to be construed together. In c. 172, s. 76, the words "directors for the time being" show that the Legislature meant the Company to continue in existence, and that the Acts should not in any way interfere with the rights of creditors. If the Company has ceased to exist, even bondholders would lose their debts. The plaintiff claims in two characters: as a shareholder, he claims a writ of *mandamus* to be placed on the register; and as a third party, he claims damages (*a*).

(*a*) See the observations of the Lord Chancellor of England and of Lord Campbell, in *The Midland Great Western Railway Company of Ireland v. Leech* (3 H. of L. Cas. 886).

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LEFROY, C. J.

We are all of opinion against making this order absolute. It appears to me to be the most anomalous application which can be imagined. The learned and able argument of the Counsel who last addressed us went to prove that the defendants are officers of a subsisting Company. Well, if it be a subsisting Company, there is a legislative provision which enables the plaintiff to proceed against it by serving its secretary as the secretary of a subsisting Company. It is not alleged that they have not a secretary; there is no ground of that sort for the application: on the contrary, the plaintiff has discovered the secretary, and desires to substitute on him service against them as a dissolved Company; arguing, to set it up as subsisting for the purposes of the suit, upon a substitution of service which is to show the Company not subsisting, being unnecessary if it subsists. Therefore it is an anomalous proceeding to make an order for the substitution of service, upon the ground that the Company has been dissolved, in order to set it up as a subsisting Company and to enable it to be sued as such. There are other grounds sufficient to prevent us from making this experimental order. I might do it at the suit, if at all, of a *bona fide* claimant or creditor. But here is admittedly a plaintiff who merely went through the form of having his name inserted in the subscription list, and who took even that step only when he had obtained an indemnity and countervailing contract that he should never be called upon to discharge a shareholder's essential duty by contributing to the Company's funds. The plaintiff is a person who, if he be a *bona fide* member of the Company, is bound by their acts; and if he is not a *bona fide* member of it, are we to make for such a person an experimental order of this nature? I cannot understand the plaintiff's motion in any view of it.

O'BRIEN, J., concurred.

HAYES, J.

This was a motion to make absolute a conditional order to substitute service of the summons and plaint on "Richard D. Kane, who *was* the attorney and also a director of said Company, and Thomas "Henry Kane who *was* appointed secretary to said Company."

The question turns a good deal more upon the true construction of the 33rd and 34th sections of the Common Law Procedure Act 1853, than upon the involved considerations arising upon the Local and Personal Acts which have been referred to.—[The learned Judge read the 33rd and 34th sections, and proceeded.]—Those

sections seem to me to assume that there is a living secretary and an existing corporation. Now I think it not too much to require the plaintiff to tell the Court, whether he insists that for *his* purposes this Company is to be treated as still existing, or as a defunct and dissolved Company. But, to save him the trouble of answering, I shall take it both ways. If he insists that it is a Company which for his purposes must be treated as still existing, he has only to serve the gentleman who was the secretary, and who until some change is shown to have occurred must be still treated as the secretary. Serve him, and then under the 33rd section you have served the Company. But if the plaintiff says that the Company is not for his purposes to be treated as an existing Company, the case is altogether out of the scope of the Procedure Act; for I think that the statute refers to Companies existing at the time of action brought, and not to those which existed at some prior period of our history.

A good deal has been said as to the ill consequences that would follow if, upon the construction of the two Waterworks Acts that have been referred to, we were to hold that the Kingstown Company has, by means of what has taken place, been utterly dissolved; but I do not think we are called on to decide anything as to that upon this motion; and if we were, it does not appear to me to be such a harsh construction to hold, as the result of both the statutes, that, after execution of the conveyance and on payment of the purchase-money by the Dublin Corporation, the directors to whom it has been paid should be held as trustees of the fund, and that the remedy should be sought in another Court against them, or rather against the fund of which they have undertaken the management.

FITZGERALD, J.

I concur in the judgment of the Court. The plaintiff's action is really for a writ of *mandamus*, to compel the Kingstown Waterworks Company to register him as a shareholder: the rest of his claim, about damages, is mere painting. The difficulty which I felt has been upon the words of the 25 & 26 *Vic.*, c. 105, *Loc. & Pers.*, s. 21, "and thereupon the Company shall be dissolved, and cease to exist."

The point, which was much argued upon the motion as to whether their liabilities were or were not transferred to the Corporation of Dublin, is entirely beside the case. I should be very slow indeed to hold that, whether or not the Corporation, *as between that body and the Company*, became subject to the Company's liabilities by the statutable contract, this contract could affect the rights of third parties, such as bondholders or creditors, who are

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properly called third parties. Without expressing any opinion upon that point, I should be very slow to hold, that even if the effect of the contract was to make the Corporation answerable for the liabilities of the Company, that could affect the rights of a pre-existing creditor, as against the property, if any, of the Company; and as against the shareholders, to compel them to make calls to the extent of the subscribed capital, and to have his demand satisfied thereout. But it is a different question when, as here, the plaintiff is a member of the Company. Upon the day when the special Act passed, he became a shareholder in this Company; and, if any remedy or right which he would have had has been lost by the omission of the defendants to place his name on the register, and so his title remains only inchoate, he, and he only, is to blame. For the purposes of contracting, and of being answerable for its liabilities, he was then a member of the Company, and continued to be so at the passing of the 25 & 26 *Vic.*, c. 105, *Loc. & Pers.*, which provides that, upon the performance of certain requisites, which have been performed, the Company shall cease to exist, and shall be as if it had never been. The directors became personal trustees of the purchase-money; and, as to the surplus above the liabilities, personally responsible to the members of the Company. Whether the plaintiff is a shareholder, so far as regards the distribution of the fund, I offer no opinion; but the ground of my judgment is, that, by the Parliamentary contract, the Company of which the plaintiff was a member ceased to exist in February 1862; and now he comes forward to make them put him on the register of a Company which has ceased to exist. We cannot, at his instance, compel them to appear in their corporate capacity,—the only character in which we could give effect to this order. If we compelled them to appear as a Company, that might create considerable embarrassment hereafter, in raising the question of law, whether the Company had entirely ceased to exist?

In the course of the argument, I pointed attention to the provisions of the 33rd section of the Common Law Procedure Amendment Act (*Ir.*) 1853, and indicated that, if the Company was still in existence, we could not supplement the mode of service pointed out there. But there are cases of corporations existing in this country, and making contracts, and having offices here, but having no secretary or treasurer in this country. I think that, in such cases, this Court, by implication, has power to substitute service of the writ of summons and plaint.

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*Queen's Bench*

J. J. REDMOND and ——— REDMOND

v.

DENIS MOONEY and another.\*

April 30.

THIS was a motion to compel the plaintiff to give security for costs.

The defendant's affidavit stated that J. J. Redmond had been, for upwards of thirteen years, resident in the United States of America; that, about the middle of March 1862, he came from New York to Dublin, where he now has a temporary residence; that the permanent residence of both the plaintiffs is in New York; that J. J. Redmond had (as deponent believed) come to this country merely to avoid giving security for costs, and, shortly before the service of the writ of summons and plaint, had told the deponent that he, the plaintiff, intended to return to New York in May 1862; that the other plaintiff resides altogether in New York; that neither of the plaintiffs has any property within the jurisdiction of the Court, so far as the defendants have been able to discover; that, unless this motion is granted, the defendants will be unable to recover their costs in the event of their getting a verdict, as J. J. Redmond will certainly leave Ireland; and that the defendants have a good and valid defence to the action, on the merits.

A plaintiff, when he is *de facto* resident in Ireland, though he has come thither for a temporary purpose and has a foreign domicile, is exempted from the necessity of giving security for costs.

J. J. Redmond made an affidavit in reply, in which he admitted that he had resided in New York for upwards of thirteen years, and will return thither as soon as his business in this country is arranged; but stated that that may not be for a considerable time, as he came to Ireland, not only for the purpose of this action, but to attend to several other affairs, for which purpose he obtained a power of attorney from his brother, the co-plaintiff; that he does not intend to return to New York until after all his affairs are settled, which will not be until after this action—in which it may be necessary for him to be examined as a witness—has been finally disposed of; that he did not come to Ireland to avoid giving security for costs; and that he and the co-plaintiff are entitled to very considerable property in this country which is more than sufficient to indemnify the defendants against any costs, should they get any, against the plaintiffs.

*T. White*, for the defendants, cited *Drummond v. Tillinghurst (a)*.

(a) 16 Q. B. 740.

\* Before LEFROY, C. J., O'BRIEN and FITZGERALD, JJ. HAYES, J., was sitting in the Consolidated Nisi Prius Court.

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*Dowse*, contra, contended that, in a case in which there are more plaintiffs than one, no security for costs will be ordered if one of the plaintiffs be resident within the jurisdiction; and, secondly, that even though there was only one plaintiff, the Court would not order him to give security for costs if he was *de facto* resident within the jurisdiction at the time when the motion was made, even though his permanent residence was in another country and he had no property here. For the first proposition he cited *Archbold's Practice by Chitty*, 9th ed., p. 1329; and, upon the latter point, *Tambisco v. Pacifico* (a); *Dowling v. Harman* (b); *Allain v. Chambers* (c), and *Swinbourne v. Carter* (d).

*T. White*, in reply, cited *Oliva v. Johnson* (e), and *Naylor v. Joseph* (f).

LEFROY, C. J.

This is an application to compel the plaintiff to give security for costs. The question is—has the plaintiff a residence in this country within the meaning of the Common Law Procedure Amendment Act (Ireland) 1853? I confess that I never should, if it were a case unaffected by authority, have arrived at the conclusion that a party who has a domicile abroad, and who for thirteen years has resided abroad, and whose domicile is there beyond all doubt, and who states that he came to this country to prosecute this action, in which he is to be himself a witness, but who does not state that he means to remain here longer than verdict, had the requisite residence to exempt him from giving security. It appeared to me that such was not a residence to exempt a plaintiff from giving security for costs. I thought that the meaning of the word "residence" was, having resided in this country and being domiciled therein, so as to be in a condition that bespoke permanence. However, I must confess that the cases have gone to this extent, that a plaintiff who is *de facto* in this country, even when he has a foreign domicile, is nevertheless resident in this country within the meaning of the Act, so as to exempt him from giving security for costs. The cases are too strong to wrestle with, both in England and in Ireland. They have gone the length of deciding that a temporary *de facto* residence exempts a plaintiff from giving security for costs. I am bound to follow those cases, though I do not give them my assent. But, though, upon the construction of the Act, I should myself have

(a) 7 Exch. Rep. 816.

(c) 8 Ir. Com. Law Rep., App., 7.

(e) 5 B. & Ald. 908.

(b) 6 Mee. & W. 131.

(d) 23 L. J., N. S., Q. B., 16.

(f) 10 Moore's Rep. 522.

arrived at a different conclusion, I am bound by authority to say that this is the construction of the Act; and we are bound to act upon that construction. The plaintiff in the present case, therefore, cannot be compelled to give security for costs.

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O'BRIEN, J., concurred.

FITZGERALD, J.

I also think that this motion should be refused. The practice of compelling a plaintiff to give security for costs rests upon this ground, that there is no person within the jurisdiction to answer the orders of the Court. When, however, there is any plaintiff within the jurisdiction against whom the orders of the Court may be put in force, the foundation on which the practice rests does not exist. If the present plaintiff has come into this country for a temporary purpose and leaves the jurisdiction at any time, the defendant may at once come in and obtain an order to stay the proceedings until the plaintiff gives security for costs. Or if the plaintiff remains in this country until the case is tried, and a verdict given against him, the defendant may have immediate execution.

The affidavits in this case show that the foundation on which the practice of compelling a plaintiff to give security for costs grew up does not exist here, where we have a plaintiff who, although only temporarily resident in this country, yet is resident within the jurisdiction so as not to be compellable to give security for costs, because our orders may be put in force against him; and therefore I am of opinion that the rule is satisfied which requires that there shall be a plaintiff within the jurisdiction against whom the orders of the Court may be enforced. It would be very difficult for the Court to determine the question if, upon a motion of this kind, it were to depend on the plaintiff's *domicile*. The question of domicile is always of extreme difficulty; but it does not arise here, where the only point is, whether the plaintiff is within the jurisdiction to answer the orders of the Court.



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*Queen's Bench*

THOMAS WALTER POOLE

*v.*  
 CHRISTOPHER DARBY GRIFFITH and others.

*April 23.*

The 34th section of the Common Law Procedure Amendment Act (*Ir.*) 1853 does not apply to actions of ejectment; but, under section 197, the Court has power to substitute service of an order on any party who has been properly made a defendant in an action of ejectment, and to direct the mode of service which may be most effectual.

THIS was an action of ejectment on the title. The writ of summons and plaint bore date the 16th of November 1861.

By an order, dated the 24th of January 1862, the principal defendant, C. D. Griffith, was directed to state what documents he had in his possession, relating to the lands in dispute.

Thereupon the defendant's attorney, by affidavit, informed the Court that Mr. Griffith had, on the occasion of his marriage, in 1855, handed over to the trustees of the marriage settlement all the title-deeds connected with his estates in England and Ireland; that the trustees are entitled to the custody of those muniments of title, which extend over a period of a century, and consist, in part, of wills, deeds, settlements, and leases, connected with the lands in dispute; and that, for the purpose of defending the present action, deponent obtained from the solicitor of the trustees a counterpart of the lease of the 19th of September 1701, which however he declined to produce without the sanction of the trustees.

Upon motion grounded on that affidavit, the Court, on the 31st of January 1862, varied its former order; and directed Mr. Griffith to state, in his affidavit, merely whether he had the lease of the 19th of September 1701 in his possession or power, and what he knew as to the custody thereof, and whether he objected (and if so, on what grounds) to the production thereof.

In pursuance of that order, Mr. Griffith and Mr. Richard Lambert (one of the solicitors for the trustees) made a joint affidavit, dated 7th February 1862, wherein Mr. Griffith, for himself, stated that the counterpart of the lease of the 19th of September 1701 had been sent to his attorney; but that *it and all other title-deeds* belonging to deponent are now in the custody of Richard Lambert and his copartner (as solicitors of the trustees of his marriage settlement), who hold them for the trustees, as having a charge thereon; and that they refuse to permit the deponent to inspect them, or produce them to the Court, or to allow access to any of the mortgage securities, so long as the charge remains unsatisfied.

Mr. R. Lambert, for himself, stated that, in sending the lease of the 19th of September 1701 for the perusal of Mr. Griffith's attorney, he had acted without the authority of his clients, and in ignorance of the existence of any suit or proceeding affecting the mortgaged premises; that the lease had been since restored to the

custody of him and his co-partner, by Mr. Stokes, to whom he had sent it for Mr. Griffith's attorney's perusal; and that they cannot part with or produce it so long as the mortgage charge remains subsisting on the premises comprised in the lease. Both deponents stated their belief that the plaintiff has no right or title to recover the whole or any part of the lands in dispute.

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On the 17th of February 1862, the plaintiff made an affidavit to the effect that he derives the lands in dispute from his grandfather, under a lease from a Mrs. Griffith, dated the 8th of May 1793, and subject to a yearly rent, payable to the principal defendant Mr. C. D. Griffith, who is the representative of the lessor; that, in this lease, the lands are described as all that, &c., theretofore, by indenture bearing date the 19th of September 1701, demised to one R. Cooke, for a term of ninety-one years, which lease expired on the 1st of May 1792; that, on search made in the office for registering deeds in Ireland, the memorial of Mr. C. D. Griffith's marriage settlement appears registered, and the trustees are therein described as Richard Lambert, of, &c., and several others; that he believes it is necessary to make these trustees parties to this suit, as they are alleged to have some interest in the lands; and that he has no doubt that, if service of the writ of summons and plaint be substituted upon Mr. Griffith's attorney, for the trustees, "they will have as full notice of such service as if served themselves with the" writ in the ordinary way. The deponent further stated that, until Mr. Griffith's attorney's affidavit was made, he never knew of Mr. Griffith's marriage, or that these several parties were trustees and mortgagees, or interested in the lands, and that they all reside in England; that Mr. Griffith's attorney acted as their solicitor in filing the joint affidavit of Messrs. Griffith and R. Lambert, and is, as deponent believes, in communication with them.

Upon this state of facts, Ball, J., on the 21st February 1862, ordered that the plaintiff be at liberty to take the original writ of summons and plaint off the file, substituting a duplicate in its place; and to amend the writ, by adding thereto, as defendants, the several persons disclosed by the affidavit of Messrs. Griffith and R. Lambert; and thereupon that the service of the writ (when so amended) upon those additional persons be substituted, by delivering true copies of the writ and of this order, for each of those persons, to Mr. Griffith's attorney, who acted as their attorney, and to Michael O'Brien, land agent of Mr. Griffith; and that, upon this order being made absolute, such substituted service should be deemed good service of the writ upon those persons respectively, unless cause shown, &c.

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Mr. Griffith's attorney filed an affidavit, as cause why that conditional order should not be made absolute. He stated that he is not, and never was, concerned for the trustees, as trustees or otherwise, and that he had never communicated with any of them in relation to the settlement, or to any mortgage to them as trustees or otherwise; that he does not know any of their rights as mortgagees, and cannot give the Court any information about the mortgage; but that Mr. R. Lambert is a grantor in the settlement only to surrender to, and vest in, the other parties some of the settled lands, but is not one of the trustees; and that deponent is not acquainted with Mr. Lambert, with whom he has communicated only when referred to him by Mr. Griffith with respect to the Irish estates, which Mr. Griffith generally manages by direct communication with deponent and M. O'Brien, the bailiff of the estate, and also in reference to all legal proceedings connected with it; and that deponent never received any communication from Mr. Lambert on behalf of the trustees, as whose attorney he did not act in filing the joint affidavit, but only as attorney of Mr. Griffith, on whose behalf it was filed; and that he forwarded the counterpart of the lease of the 19th September 1701 to Mr. Griffith, in London, on the 4th February 1862.

*Rollestone, J. E. Walsh, and C. Tandy*, moved the Court to make absolute the conditional order dated the 21st of February 1862.

The plaintiff's object is to obtain an inspection of the lease of the 19th of September 1701; but, on the present motion, the Court has only to consider the question whether the persons on whom it is sought to substitute service are proper persons for that purpose? If it is likely that the writ and order served upon them will reach the defendants, that is enough: *Kett v. Robinson* (a). Personal service was necessary in that action, which was *in personam*; but, since the present action is *in rem*, service on the persons who deal with the lands and rents will suffice. There is no contradiction of the plaintiff's statement that, if service of the writ be substituted on Mr. Griffith's attorney for the trustees, they will have as full notice of it as they would have if served in the ordinary manner. He has filed the joint affidavit of Messrs. Griffith and Lambert (the latter of whom is the English solicitor for the trustees), and is therefore an agent within the meaning of the statute, namely a person having to perform towards his principal the moral duty of transmitting the writ: *Reilly v. White* (b). The language of

(a) 4 Ir. Com. Law Rep. 186.

(b) 6 Ir. Jur., N. S., 87.

the Common Law Procedure Amendment Act (Ireland) 1853, s. 34, is general, so that the agent of an agent is a person on whom service may be substituted.

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Serjeant *Armstrong* and *Edward Johnstone* showed cause, and contended that Mr. Griffith's attorney was not "an agent, representative, or manager of the real or personal estate" of the trustees, within the meaning of the 34th section; and, although there follow the words "or on any other good and sufficient grounds," yet those words mean grounds of the same character as those previously enumerated: *Dickson v. Capes* (a).—[FITZGERALD, J. Has it ever been the subject of decision that the 34th section applies to actions of ejectment at all? I think that the 197th section applies to actions of ejectment; and then the 227th section enacts that "all other provisions herein contained shall extend to ejectments, *mutatis mutandis*, unless where the same shall not be applicable, or where the subject-matter thereof shall have been herein otherwise provided for." It seems to me that the "subject-matter" has been "herein otherwise provided for" in the 197th section, and that the 34th section does not apply to actions of ejectment. I find that, in *Hutton v. Nolan* (b), an order to substitute service in an action of ejectment was made under the 34th section; but the point as to the applicability of that section to actions of ejectment does not seem to have been raised in that case.]—At all events, the affidavits do not show that either Mr. Griffith's attorney or Michael O'Brien is an agent within the words of 34th section, as interpreted by the case of *Dickson v. Capes*.—[LEFROY, C. J. What was the ground upon which Ball, J., made this order?—The order was made on the plaintiff's allegation that Mr. Griffith's attorney was acting as solicitor, not only for Mr. Griffith, but also for the trustees. That was a ground for calling upon him to explain his position in relation to them; but that allegation has been displaced by the affidavits.—[FITZGERALD, J. I suppose you contend that the trustees are neither "proper nor necessary parties" to the action; because, if they are, the 197th section gives us jurisdiction to make this order absolute.]—Certainly; and furthermore, even if they were "proper and necessary parties" to the action, the practice of this Court only requires that the parties *in possession* shall be served.

*J. E. Walshe*, was heard in reply.

The plaintiff has made a case for substitution of service, as well

(a) 11 Ir. Com. Law Rep. 346.

(b) 8 Ir. Com. Law Rep., App., 11.

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under the 34th section (within the doctrine laid down in *Dickson v. Capes*), as under the 197th section, which was enacted to give the Courts larger powers in actions of ejectment, in which it is necessary that there should be some place on the lands where a defendant can be served; because there is only one jurisdiction within which it is possible to sue him, whereas personal actions can be brought in other Courts, or in other jurisdictions in which the defendant himself may be. The 197th section was purposely framed in wide language, in order to give the Court a discretion; and the Court need only take precautions that a man's rights shall not be affected behind his back, and be satisfied that he has an interest of some sort in the lands.—[FITZGERALD, J. My difficulty is, whether the trustees are necessary and proper parties to the action? If they are, then there must be some method of serving them; and we have power to order substitution of service for them under the 197th section.]—None of the affidavits state that the trustees have not, as such, an estate in the lands; and the memorial in the Registry-office enumerates them among the grantees of the estate.—[LEFROY, C. J. Cannot you have an effectual service, for all purposes of this action, by serving the parties in possession of the lands?—No: for, though a judgment in ejectment recovered after such a service would not be set aside for non-service, yet the rights of the trustees would not be bound by it, and they could at any time bring against the plaintiff a cross-action of ejectment. The plaintiff, without serving the trustees, cannot make the affidavit required by the 185th General Order. The affidavits show that the writ will reach the trustees if this order is made absolute. Mr. Griffith's attorney does not deny that he is in communication with them, but only that he is in communication with them *as trustees or mortgagees*.

LEFROY, C. J.

In this case it is quite plain that Mr. *Walsh's* client (the plaintiff) is entitled to the production of the lease of the 19th of September 1701. The lease under which he holds refers to it; and he is therefore entitled to get at that lease, and to call upon us to enable him to get at it by any way in which that can be done legally. The parties who have the deed are necessary and proper parties to be defendants in this action of ejectment. The application now made is to enable the plaintiff to serve those parties without whom there cannot be any effectual ejectment, for he cannot by any other ejectment bind their right. The plaintiff is entitled to do so, and is entitled for that purpose to have

access to this deed of 1701; and is therefore entitled to serve them also with a copy of this order. The application is that he may substitute service on them; and I am of opinion that we are entitled to make an order to that effect upon the grounds stated by my Brother FITZGERALD during the argument.

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I wish to observe that this is quite a different case from a motion to substitute service on a party for the purpose of making him a defendant. Here, these parties are defendants already; and the question is with respect to the substitution of the service of this order on those who are defendants. The motion is not to substitute service for the purpose of making them defendants, for there it would be necessary to make out a case of agency, or a case coming within the express words of the Act of Parliament: but this is a case within the practice of the Court to substitute service of this order on parties who are already defendants.

O'BRIEN, J.

The substitution of service upon the trustees will be made on the bailiff of the estate Michael O'Brien, and upon Mr. David Mahony personally, and also upon each of the trustees, by transmitting to their respective residences, in a registered letter, copies of the writ of summons and plaint and of this order. The 197th section is far more extensive, and gives to the Court far larger powers, than the 34th section; which, for the reasons stated by Mr. *Walsh*, who has shown the distinction between the two classes of actions—personal actions and actions of ejectment,—I think inapplicable to actions of ejectment.

HAYES, J.

Not having been present at the beginning of the argument, I had intended to take no part in the decision. But, an important general question having arisen, I may be excused for offering an observation upon it, and say why I concur in the judgment of the Court. I think that the 34th section of the Common Law Procedure Act 1853 does not apply to the action of ejectment, which is fully embraced by the short and comprehensive language of the 196th section, specially framed for that action. Great inconvenience would flow from holding that the action of ejectment was included in the 34th section. When that section speaks of a "proper" service, through or upon an agent, representative, or manager of real or personal estate, it appears to me that it points to a person shown to stand in such a relation to the defendant that the Court might reasonably infer it to be his duty to forward to the defendant any

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process that should come to his hand ; just as it would be the duty of the wife, child, or servant of the defendant, mentioned in the 32nd section, to hand to him the process received by any such persons. Accordingly this Court has refused to substitute service under this section, upon an agent who it sees is invested only with a certain limited and circumscribed authority, as that of an attorney for the defendant in another and different cause ; for it is no part of the duty of such an agent to forward to the client the process received in other actions than that in which he has been retained. All this is very well in a personal action, which may be brought either in the jurisdiction within which it has arisen, or in that of the defendant's residence ; but it is very different with an ejectment, which must be brought in the jurisdiction within which the lands are situated, and where it is necessary, in the absence of agency and representation, to contrive some mode of service, if there is not to be an absolute denial of justice.

FITZGERALD, J.

I wish to state the grounds upon which I concur in the result at which the Court has arrived. My impression is, that the 34th section does not apply to actions of ejectment, but applies only to personal actions, wherein the cause of action may or may not arise within the jurisdiction of the Court. I am confirmed in that opinion by the case of *Swanton v. Gould* (a), in which this Court held that the 10th section of the same Act—a section also general in its terms—did not apply to actions of ejectment, but that personal actions only were within the meaning of that section. Then the question arises, whether, under the 197th section, these trustees were properly made parties defendants in this action ? for, if they have been made defendants unnecessarily, we ought not to substitute service of this order on them. It seems to me that they have been properly made parties to the action. Originally they were not parties. But it turned out, upon a motion made before Ball, J., for the production of documents, that these trustees had, or claimed to have, some legal interest in the lands, and were in possession of the title-deeds, and claimed the exclusive right to hold them, and to exclude the Court and the parties from seeing them. Down to the present moment they have, in a studied manner, excluded the plaintiff from seeing the title-deeds, and have not disclosed in any affidavit—indeed, have steadily refused to disclose—their title. We are bound to hold that they have, or claim, some legal interest in the lands which are the subject-matter of the ejectment, and have

(a) 9 Ir. Com. Law Rep. 234.

got possession of the deeds; and, under that state of facts, I think that the plaintiff has acted properly in making them defendants. Being thus already defendants, the plaintiff comes in, under the 197th section, to ask us to sustain the order of Ball, J. That section gives ample authority to make the order, and to direct the mode of service which may be most effectual. And accordingly the order directs, not only that the parties shall be served with the process or notice, by serving it on Mr. Mahony the defendant's solicitor, and on Michael O'Brien who is in receipt of the rents, but also takes care that it shall reach these very parties, by a registered letter, sent to each of their respective residences. If they have no interest to defend, and if they have unnecessarily been made parties to the action, they need take no steps, or notice the order at all; but if they have an interest in the lands, which it is worth defending, they must come in here as parties, under the terms under which ordinary defendants are placed, namely, of being subject to the jurisdiction of the Court; and, amongst other things, of being subject to the production of documents in their possession, if the Court shall so direct.

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JOHN TAAFFE v. JAMES TYRRELL and  
CHARLES G. STANUELL.\*

T. T. 1862.  
May 30.

**INTERPLEADER.**—In this case, the plaintiff in an interpleader suit, having obtained a verdict, which established his right to the goods that had been seized, moved the Court “that the defendants do pay “to him the costs of this motion and of the interpleader motion, “and all costs necessarily incurred by the plaintiff in this cause in “respect of such proceedings.”

The following facts appeared from the affidavits:—The now defendants had been plaintiffs in an action in which one Alexander Grant was the defendant. Having recovered a judgment against him, they, on the 11th of March 1862, lodged in the hands of the officer of the Sheriff of the county of Sligo, for execution on the goods of A. Grant, a writ of *fi. fa.*, marked for the sum of £56. 19s. 2d. On the 14th of March, the Sheriff went to Grant's lands, and ascertained that all his stock, goods and chattels, were under seizure for rent; which circumstance the Sheriff stated in an affidavit, dated the 9th of April, of which the defendants had notice. On

The Sheriff is entitled to get from the plaintiff, who succeeds, as claimant, in an interpleader issue, the expenses of keeping live stock, seized under a *fi. fa.*, of which the plaintiff might, upon giving security to the Sheriff, have obtained possession.

\* Before the Full Court.



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the 22nd of March, Grant executed to his landlord, the now plaintiff, a bill of sale, whereby he assigned *all* his goods and chattels to the now plaintiff, in consideration of arrears of rent. On the 26th of March, this bill of sale was duly registered. On the 28th of March, the Sheriff seized a large quantity of *live* stock on the lands, of which A. Grant was the tenant to the now plaintiff, who, shortly after the seizure, cautioned the Sheriff not to sell the goods, as they had been assigned to him by a bill of sale. No communication respecting the writ was received by either of the now defendants until the 30th of March, when they received a letter from the attorney of the now plaintiff, apprising them of the bill of sale. On the 2nd of April, the Sheriff served the defendants with a notice, accompanied by a copy of the now plaintiff's notice of claim, dated the 29th of March. The defendants having refused to permit the Sheriff to abandon the seizure, he, on the 4th of April, obtained the usual summoning order; and, on the 11th of April, Deasy, B., made the usual interpleader order, which directed an issue, and further provided that the Sheriff might, upon receiving satisfactory security, be at liberty to deliver up the goods and chattels seized by him to the now plaintiff. No sufficient security having been tendered, the Sheriff retained possession of the *live* stock. The issue was tried in the Consolidated Nisi Prius Court, before HAYES, J., on the 12th of May, when the jury found a verdict for the now plaintiff.

The now plaintiff submitted that it would be unjust to put on him any part of the expense of keeping the live stock and goods, or any part of the costs of the proceedings, as they had been caused by the defendants, who relied on a defence which had failed. The now plaintiff added, that neither the Sheriff nor the defendants had ever called upon him to take the goods and live stock seized on the terms of the order of the 11th of April; and that, as he had suffered considerable pecuniary embarrassment, it would have been difficult, if not impossible, for him to have given the Sheriff security for the sheep and goods seized by him under the defendants' execution, even if the amount of the security were limited to the amount of the execution.

The Sheriff, in his affidavit, claimed all the expenses of keeping the live stock and goods. He based his claim upon the non-tender to him of sufficient security, which imposed on him the obligation of retaining possession of them, whereby he had incurred great expense for poundage, keep, and grazing of the stock, the nature of which obliged him to employ several men to watch them.\*

\* A few head of cattle had been seized; but the stock consisted principally of some hundreds of mountain sheep, which had been scattered over five or six thousand acres of mountainous country.

One of the defendants made an affidavit, in which he stated that they, until the trial, were under the belief that the now plaintiff and Grant must, previous to the execution of the bill of sale, have had notice that the writ of *fi. fa.* had been lodged with the Sheriff, and remained unexecuted in his hands; that neither of the defendants had ever been called upon to pay to the now plaintiff any sum for rent due to him by Grant; so that, until the trial, they believed that the claim for rent was not a *bona fide* one; that the circumstances attending the execution of the bill of sale made it incumbent on the now plaintiff to satisfy the now defendants that it had been executed *bona fide* and for a valuable consideration; and that the now plaintiff, if he had given security to the Sheriff to about the amount of the sum for which the writ of *fi. fa.* issued, could have procured possession of the goods and chattels seized, and saved the costs incurred by the Sheriff in keeping them. Upon these grounds the defendants claimed to be exempted from paying the Sheriff's expenses in keeping the live stock and goods; and submitted that they ought not to be made to bear any portion of the now plaintiff's costs, or of those incurred by the Sheriff.

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TYRELL.

*Sidney*, on behalf of the plaintiff, moved the Court to grant him his costs of suit, and to exempt him from paying any portion of the Sheriff's expenses.

*Harkan* appeared for the Sheriff; and maintained that he was entitled to get his expenses, as he was in duty bound to keep the stock safe and alive.

*C. J. Ferguson*, for the defendants, contended that the delay of the Sheriff, in executing their writ of *fi. fa.*, disentitled him to get costs from them; and that, if any costs were awarded to him, they should be paid by the now plaintiff, who would be only paying for the keep of his own cattle, who had not given security, and who had postponed the trial of the cause until the very end of the Sittings of the Consolidated Nisi Prius Court, though it might have been tried there nearly a month earlier.

LEFROY, C. J.

The question we have to decide in this case is not as to the title to the property seized. We have only to dispose of the costs and the Sheriff's claim for the expenses incurred by him in respect to the property taken under execution, which in this case happened to be live stock. The plaintiff on the issue, who claimed the property

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under a bill of sale, has established his title as against the execution creditor, and he is entitled to have the fruit of his verdict, namely, the property, and is also entitled to the costs incurred under the issue. The remaining question then is with respect to the Sheriff's claim for the keep of the horses. When he seized, they were at grass with the plaintiff's tenant. The plaintiff might have obtained possession of them from the Sheriff upon giving security, had he thought fit so to do; and might have taken upon himself the feeding and care of them. The Sheriff however, since no security was given or offered, was bound, in the performance of his duty, to keep the horses and preserve them alive; and therefore he is entitled to be reimbursed the expenses which he necessarily incurred in performing his duty in that way. Of course, if any question was raised as to the reasonableness of the charge made by the Sheriff, it might be a matter for inquiry by the officer, upon the taxation of the costs: but *prima facie* the Sheriff is entitled to get these expenses. Who then is to pay them? Clearly the party who might, if he had pleased, have kept the horses in his own care and at his own expense; but has foregone that opportunity, and has thrown upon the Sheriff the obligation of keeping them, when in consequence of the plaintiff's claim he was prevented selling them at once.

The other Members of the Court concurred.

Order.—Let the defendants pay to the plaintiff the costs of this motion, interpleader motion, and of and necessarily incurred by the plaintiff in this cause in respect of such proceedings, when taxed and ascertained. Let it be referred to the proper officer to tax, ascertain, and certify the same. And let said Sheriff of the county of Sligo give up to the plaintiff the goods and chattels seized by him under the writ of *fi. fa.* in said cause of *Tyrrell and another v. Grant*. Let the defendants pay to the said Sheriff the sum of £10, as and for the keeper's fees, and also the Sheriff's costs of this motion. Let the plaintiff pay said Sheriff for the maintenance of the sheep, calves, and goats, seized by him. This order to be without prejudice to any cause of action the plaintiff may have, for or in respect of any injuries he may have sustained by reason of the acts of the said Sheriff, or of the defendants in this cause.

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*Queen's Bench*

MARY GARDINER v. JAMES GARDINER.

June 14.

MOTION to set aside defendant's notice of trial by proviso.

The action was brought to recover rent due under a lease. The case had been tried upon a former occasion (4th of December 1860), when the defendant obtained a verdict. In the ensuing Term (Hilary 1861), that verdict was set aside, and a new trial ordered. Neither party took any further proceeding in the cause until the 4th of June 1862, on which day the defendant served a notice of trial by proviso for the ensuing Nisi Prius Sittings in Dublin. In Easter Term 1861, the plaintiff brought another action, in the Court of Common Pleas, to recover one year's rent due under the same lease; and, a demurrer having been argued and judgment obtained thereon in the meantime, served notice of trial in *that* case on the defendant, for the ensuing Nisi Prius Sittings in Dublin. That notice was served at 3 P. M., on the 4th of June 1862; and the defendant's notice of trial by proviso in this cause was not served until 4 P. M., on the same day.

The 178th  
 General Order  
 applies to cases  
 of trial by  
 proviso.

*Palles* now moved the Court to set aside the defendant's notice of trial by proviso as irregular.

No proceedings have been taken by either party for a year and a day previous to the service of the notice of trial; no compromise has been depending; and no rule for liberty to proceed has been obtained under the 178th General Order. The question is, whether that General Order applies to cases of trial by proviso? The reason why it was held that judgment as in case of a nonsuit might be moved for without a Term's notice, although no proceedings had been had for a year, was that the Rule requiring such notice was made previous to the statute: *Manley v. Wortley* (a). In *Marsh v. Williams* (b) the defendant had judgment in his favor because he had obtained a conditional order under the 178th General Order.

*Heron* and *Phillips*, for the defendant.

In *Marsh v. Williams*, Monahan, C. J., said that it is a defendant's Common Law right to have a trial by proviso. The 178th General Order never was meant to apply to proceedings after a trial. In England it is not necessary to give a Term's notice when

(a) 2 Wm. Bl. Rep. 1223.

(b) 7 Ir. Com. Law Rep. 99.

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a case is to be brought to trial by proviso after the lapse of a year: *Theobald v. Crickmore* (a). Especially *after verdict* the notice is not necessary: *May v. Wooding* (b), and *Marsh v. Williams* was decided before verdict.—[LEFROY, C. J. I really do not know how the plain words of the 178th General Order are to be construed unless we grant this motion.—O'BRIEN, J. There would be no use in Judges making Rules unless they are carried out.]—The distinction is laid down in 2 *Ch. Arch.* (ed. 1858), p. 1423:—"That the "defendant must give the plaintiff the same notice of trial that the "plaintiff is obliged to give him in ordinary cases."

*Palles* was not heard in reply.

LEFROY, C. J.

This motion must be granted with costs. Giving the costs of the motion against the defendant will induce parties to remember the Rule, and construe it correctly.

(a) 2 B. & Ald. 1594.

(b) 3 M. & Sel. 500.

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PECK v. NOLAN.

H. T. 1864.  
*Exchequer.*  
 Jan. 14.

(*Exchequer.*)

Common Law  
 Procedure Act  
 1854, ss. 56  
 and 57.  
 Form, and  
 extent of, in-  
 terrogatories  
 which may be  
 exhibited to an  
 executor upon  
 plea of *plene*  
*administravit*.  
 Such motions  
 must be upon  
 notice.

*Exham* (with whom was *M. O'Shaughnessy*), on behalf of a simple contract creditor of James Nolan deceased, applied for leave to exhibit the following interrogatories to John Nolan, his executor, who had pleaded *plene administravit*: First—What was the total amount of all the personal estate and effects of the said James Nolan deceased, in the writ of summons and plaint named, which came to your hand as his executor, to be administered? Secondly—Of what did the same consist? Set forth the particulars of the same. State in what manner you have administered the same, specifying in particular what the interest in the business of deceased, as a grocer or such like, sold for; and to whom it was disposed of. Thirdly—What have you paid as and for testamentary expenses? Set forth the amount and the dates at which same were paid. Fourthly—What have you paid as and for debts to the Crown, and other debts upon record? Set forth the amount and the date at which the same were paid respectively. Sixthly—What have you

paid as and for simple contract debts of the said James Nolan? Set forth the amounts paid at foot of same, and the dates at which same were paid respectively. Seventhly.—In what further and other manner have you disbursed any of the estate and effects of the said James Nolan? Set forth the amounts you have paid, and the dates at which the same were paid respectively. Eighthly.—What assets are there yet outstanding unrealized of the said James Nolan? Set forth the nature, quality, and amount of same, and on what security they now stand.

H. T. 1864.

*Exchequer.*

PECK

v.

NOLAN.

The motion was upon notice, pursuant to the practice of this Court in such cases.

Counsel contended that the 56th and 57th sections of the Common Law Procedure Act 1856, gave as full power to the plaintiff in such a case as the petitioner had under the old Equity practice. They relied upon *Bullen and Leake's Prec.*, 2nd ed., p. 494, *note*; *Storey's Eq. Pl.*, sec. 37; *Mitford on Pl.*, sec. 45; *Van Heythuysen's Eq. Draftsman*, *passim*; *Bartlett v. Lewis* (a).

*James Murphy*, contra, contended that the executor's costs should be provided for, as the result of the answers to the interrogatories might be to establish the truth of his plea.—[PIGOT, C. B. Is not this a case of first impression, under the Common Law Procedure Act?]  
—Yes. He cited *Stern v. Sevastopulo* (b).

The following was the order made:—

That the defendant do answer the said interrogatories by affidavit, to be filed in this Court within three weeks from the date hereof: and that the costs of the said interrogatories, of the answers thereto, and of this motion, be, and the same are, hereby reserved until further order.

(a) 10 C. B., N. S., 249.

(b) 14 C. B., N. S., 737.

### GODFREY v. BRODERICK.

Feb. 1.

THE matters in dispute between the plaintiff and defendant, the costs of the action, and of the reference and award, having been referred to an arbitrator, his award contained (amongst other things)

The Court will not remit an award to the arbitrator, although he has used, in its

popular sense, a phrase which, when construed technically by a Taxing Master, inflicts costs upon the party to whom the arbitrator intended to give them, and notwithstanding his subsequent certificate of the sense in which he used the phrase.

H. T. 1864. the following sentence:—"I accordingly allow plaintiff's demurrer  
*Exchequer.* "to each of said fourth defences to said first and second counts;  
 GODFREY "and award to the plaintiff the costs of said demurrers *up to and*  
 v. "inclusive of the costs of setting down same for argument in the  
 BRODERICK. "Court of *Exchequer*, but not further or otherwise: and I order  
 "said costs to be paid to plaintiff by defendant, or to be allowed by  
 "defendant to plaintiff out of the costs hereinafter awarded by me  
 "to be paid by the plaintiff to the defendant."

The Taxing Master, when taxing the plaintiff's costs of the demurrer, refused to allow the costs of briefs and fees to Counsel for the argument of the demurrer; holding that the charges in relation to them did not form any part of "the costs of setting down the demurrer."

The arbitrator subsequently gave the following certificate:—"I hereby certify that, by the award made in this action, I intended to allow the plaintiff all costs of the demurrer, incurred by him previous to the case coming down to trial: but being under the impression (which I am informed was an erroneous one) that no costs had been incurred since the demurrer was set down, I allowed the following words to stand in the draft award, furnished me by the defendant, that is to say, 'up to and inclusive of the costs of 'setting down same for argument in the Court of *Exchequer*, but 'not further or otherwise;' and I thought that these words were introduced to prevent the plaintiff from ascribing any part of the costs of the hearing before me to the demurrer, which was in fact argued before me."

*Jellett* now moved that the Taxing Master should be at liberty to allow the briefs and fees to Counsel for the argument of the demurrer; or that it be referred back to the arbitrator to amend his award in relation to said costs, pursuant to his certificate. He cited *Russell on Arbitration*, p. 677, *et seq.*

*O'Riordan*, contra.

The award, once made, cannot be altered; nor can the arbitrator's subsequent certificate be looked at: *Leggo v. Young* (a); *Hodgkinson v. Fernie* (b); *Phillips v. Evans* (c). There was no misconduct on the part of the arbitrator; therefore the award cannot be altered or reviewed: *In re Hall and Hinds* (d); *Cleary v. Cleary* (e).

*Jellett*, in reply.

(a) 16 C. B. 626.

(b) 3 C. B., N. S., 189.

(c) 12 M. & W. 309.

(d) 2 M. & G. 847.

(e) 10 Ir. Com. Law Rep. 329.

Pigot, C. B.

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BRODERICK.

We must refuse this motion, although there is a clerical error in the award. The arbitrator has used a word in one sense, and that word has been construed in another sense by the Taxing Master. The arbitrator, in his award, expressly states that he intends to apportion the costs between the parties; and he awards the costs of the plaintiff's demurrers, "up to" a certain stage of the case, to the plaintiff. The Taxing Master says that means only up to setting down the demurrers for argument. We cannot depart from the established rule. In *Phillips v. Evans* (a), palpable injustice was done, but the Court would not interfere. If parties select the tribunal of arbitration, they must accept all its consequences.

Motion refused, with costs; for which the sum of £3 was measured.

(a) 12 M. & W. 309.

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Writs of *certiorari* are granted, not as matter of right; but in the exercise of a sound judicial discretion.

To sustain an application for a writ of *certiorari* to remove presentments, on the ground that they are illegal, the illegality must appear *on the face* of the presentments: the Court will not go behind them.

If "the year of the King's reign, and the chapter and section of the Act of Parliament under which" a "presentment," for the levying of any public money, "is authorised to be made and stated," is not inserted on the face of the presentment, the omission is an illegality apparent on the face of the presentment; and warrants the granting, on that ground, of a writ of *certiorari*.

When the interests of a large portion of the *public* are concerned, the Court will *sometimes* grant a writ of *certiorari*, although the application for it has not been made until after the lapse of a period greater than would debar an individual from obtaining the writ to redress his own *private* injury.

A Grand Jury has not jurisdiction to make, on a county *at large*, re-presentments for arrears of county cess; nor to re-present arrears to be levied *by instalments*.

The Grand Jury of the county of Mayo re-presented arrears of county cess to be levied off the county *at large*, by *twenty instalments*.—*Held*, that there appeared *on the face* of the re-presentments an absolute want of jurisdiction such as warranted the Court in granting a writ of *certiorari*

## CERTIORARI.

to remove them for the purpose of their being quashed.

The circumstance that some part of the moneys so re-presented had been in fact levied before the making of an application for a writ of *certiorari*, was held not to be a bar to the granting of the writ, and the quashing of the re-presentments.

A presentment, purporting to be for the costs incurred by the solicitor of a Grand Jury in relation to a Bill which was passing through Parliament at the time when the presentment was made, shows *on its face* an illegality which warrants the Court in granting, on that ground, a writ of *certiorari*.

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## COPYRIGHT.

The proprietor of copyright in a book need not, in an action for the infringement thereof, aver that the defendant published the plaintiff's *book*. The plaintiff states a good cause of action if it avers that the defendant published *parts* of the plaintiff's book.

Such a cause of action is not answered by a plea in confession and avoidance, to the effect that the book of the plaintiff and the books of the defendant were composed by one and the same author, from common sources of information; "and that no *part* of the defendant's said books, or of either of them, was copied or colorably altered from the said book of the plaintiff. Q. B. *Rooney v. Kelly* 158

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An action of contract having been brought, to recover the sum of £109. 10s. 11d., the parties agreed to refer the subject-matter of the action to arbitration; and a submission was entered into, which contained the following provision:—"That the costs of the action, and incident to the consent and award to be made thereon, and of the arbitration, *shall abide the result* of the said award." An award was made, in favor of the plaintiff, for £18. 10s. 10d.

On taxation, the Taxing Officer refused to allow the plaintiff full costs, as he had recovered a sum less than £20.

On motion, that the Taxing Master be required to review his taxation in that respect—

*Held*, that by the provision with respect to costs, in the submission, the parties had contracted themselves out of the 243rd section of the Common Law Procedure Act 1853;

That the true construction of that provision in the submission was, that the right to full costs should follow the legal result, independently of the amount recovered;

And therefore that the plaintiff was entitled to full costs.

*Wigens v. Cook* (6 C. B., N. S., 784) and *Jones v. Jones* (7 C. B., N. S., 832) followed. Q. B. *Owens v. Van Homrigh* 363

#### COSTS, SECURITY FOR.

A plaintiff, when he is *de facto* resident in Ireland, though he has come thither for a temporary purpose and has a foreign domicile, is exempted from the necessity of giving security for costs. Q. B. *Redmond v. Mooney* App. xvii

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#### COVENANT, CONSTRUCTION OF.

Where a deed of assignment, after reciting that under a certain deed A was seised and possessed of certain premises, and that he had agreed with the plaintiff for the sale of all the defendant's estate and interest under the same deed, to the plaintiff, witnessed that the defendant did grant, &c., and assign unto the plaintiff, the premises, to hold same to him, his heirs, executors, &c., for ever; and also contained a covenant that the defendant then had in himself good right, full power and lawful authority to make that conveyance of

his estate and interest under the said deed to the plaintiff, his heirs, executors, &c.—*Held*, that this was not an absolute covenant that A had power to convey a freehold estate, but only that he had power to convey such an estate as he took under the said deed. C. P. *Delmer v. McCabe* 377

#### DAMAGES, REMOTENESS OF.

The defendant, under an agreement in writing, undertook to act as agent in Glasgow for the plaintiffs, cattle and provision dealers in Dublin; part of the agreement was, that the defendant should open a cash account at a bank in Glasgow, to the amount of £500, to be used at any time in honoring and retiring cash orders of the plaintiffs. It was also agreed that no cash order would be drawn by the plaintiffs "without the defendant having in his hands the full amount of such orders previous to his being required to pay the same."

While the defendant had cash in bank, and goods in hands, amounting to more than the £500, upon the day on which a cash order for £250 fell due in Glasgow, the defendant left that city, and the order was returned dishonored to Dublin. It having been proved that, in consequence of the cash order having been dishonored, the plaintiffs' trade in Glasgow was suspended, that their Dublin business was seriously impaired, and that they had lost the agency of an Australian firm; the jury gave damages for loss upon each of those heads.—*Held*, that no portion of the damages was too remote, as the losses flowed naturally from the default of the defendant.

*Semble*—That the rule laid down in *Hadley v. Baxendale* (9 Exch. 341) is too strict, and that *Smeed v. Frood* (Ell. & Ell. p. 614), and *Gee v. The Lancashire and Yorkshire Railway Company* (6 Hurl. & Nor. 221) contain sounder expositions of the law as to the proximate or remoteness of damages. E. *Boyd v. Fitt* 43

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1. A summons and plaint which seeks to recover damages for a partial breach of a contract, but shows that the plaintiff is entitled to recover for a breach of the entire contract, will be set aside upon demurrer. *E. Kingsley v. Hacket* 58

2. The summons and plaint stated that by a policy of assurance made by the defendants as trustees of the A Life Assurance Company, reciting that the plaintiff had proposed to effect an assurance on the life of M., and had caused to be delivered, into the office of the said Company, a declaration setting forth the age, &c., of M.; and that it had been agreed that such declaration should be the basis of the contract of assurance, it was agreed that upon the death of M., the funds of the Company should, in consideration of the premiums, be liable to pay to the plaintiff the sum of £200; provided that if anything averred in the declaration should be untrue, the policy should be null and void. Averment:—That the said M. died whilst the policy was in full force and effect; and non-payment.

Defence:—That, by the declaration in the summons and plaint mentioned, and which was by the policy made the

## DEMURRER.

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basis of the contract of assurance, the plaintiff undertook that the age of M. did not exceed fifty-six years; and it was thereby agreed that the said undertaking should be the basis of the contract, and that if any untrue averment should be contained therein, the policy should be null and void. Averment:—That the age of the said M., at the time of the signing of the said declaration, exceeded fifty-six years, and by reason thereof that the said policy was null and void.

Replication, on equitable grounds: That before and at the time of the making of the said proposal and policy, the plaintiff was in communication with the defendants, upon the subject of the said proposal and policy; and that in the course of, and all through such communications, the defendants meaning and intending that the plaintiff should believe and act upon the belief, by their conduct caused the plaintiff to believe, and the plaintiff accordingly did believe, and acted upon and made such proposal, acting upon the belief that the age of the said M. did not, at the time, &c., exceed fifty-six years; and the plaintiff did not in fact know, save than from the defendants themselves, whether the age of the said M., at the time, &c., exceeded fifty-six years or not.

*Held*, on demurrer, that this was a good equitable replication.

That it did not contradict or vary the contract under seal, declared on in the plaint, and therefore was not a departure.

That the matters pleaded therein amounted to an independent parol collateral contract which would have afforded grounds for an action against the defendants; and, when pleaded by way of replication, brought the case within the principle of *Pickard v. Sears*. *C. P. Sweeney v. Promoter Life Assurance Company* 476

3. By the 19 & 20 Vic., c. 62, the Lower Bann Navigation Trustees

were incorporated for the purpose of the maintenance and conservancy of the Lower Bann Navigation, which was vested in them; and they were empowered to make bye-laws for the well and orderly using and preserving the said navigation; and to enforce penalties against any persons who should throw or deposit any ballast, &c., so as to interrupt or obstruct the free passage of water or vessels into, through, or in the said navigation, or do any other damage thereto. The plaintiff, alleging that he was entitled to the exclusive right of fishing for eels in a portion of said navigation, complained that the defendants neglected to conserve the navigation, and that the channel and navigation had been used by poachers, &c., for unlawful purposes, and had been unlawfully obstructed, and injury thereby done to his fishermen and fishing implements, &c., for which he claimed damages, and a writ of *mandamus* to the trustees to remove the obstructions, and to conserve the navigation in a sufficient manner.—*Held*, upon demurrer, that the summons and plaint disclosed no sufficient cause of action, nor any ground for a writ of *mandamus* in a civil action. *C. P. Hastings v. Bann Navigation Trustees* 534

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## DETINUE, ACTION OF.

Where lands are conveyed by a deed operating under the Statute of Uses, the grantee or releasee to uses is not entitled to the possession of the title-deeds.

And therefore, where the lessee of a freehold lease granted the demised premises, by way of settlement, to A, to hold in trust for B, his heirs, executors, administrators and assigns,

## DOWN SURVEY.

for all his (the lessee's) interest therein—

*Held (dissentiente HAYES, J.)*, that A could not maintain an action of detinue for the indenture of lease. *Q. B. Malone v. Minoughan* 540

## DISCHARGE OF JURY.

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## DOWN SURVEY.

A piece of bog, X, was surrounded by four townlands, A, B, C, and D. X was described in the reference to the Down Survey as "bog belonging to the adjacent towns." A, "together with all bogs, &c., &c., thereunto belonging," had been granted to the ancestors of the plaintiff by letters patent of the 33 *Car. 2*; and B, "together with all bogs, &c., &c.," had been granted to the ancestors of the defendant, by letters patent of the 19 *Car. 2*.

To an action for trespass upon X, brought by the owner of A, a tenancy in common was pleaded by the defendant the owner of B. At the trial, the meaning of the reference was left to the jury, who found for the defendant. Upon motion for a new trial—*Held* (the LORD CHIEF BARON *dissentiente*), that the words "belonging to the adjacent towns" did not, at the date of the letters patent, create a tenancy in common in X, but meant that undefined portions of X formed part of the adjacent towns.

*Per* the LORD CHIEF BARON—The meaning of the words "belonging to the adjacent towns" was a question for the jury, who had properly found those words to mean that X was held in common by the owners of the adjacent townlands.

To establish a tenancy in common by use and enjoyment, acts of ownership by all the alleged tenants in common, in various parts of the lands indifferently, must be proved.

A jury may, without consent, be

## DRAINAGE ACTS.

discharged from finding upon an issue which their findings on other issues render immaterial.

The inadmissibility of the Ordinance Survey as evidence upon questions of title illustrated. *E. Tisdall v. Parnell* 1

## DRAINAGE ACTS.

The 16 & 17 *Vic.*, c. 130, s. 36, deprives all persons injured by the works of the Drainage Commissioners of Ireland, of the right of proceeding by action or suit to recover damages or compensation, but substitutes certain proceedings before an arbitrator. In case the Commissioners do not serve the notice prescribed by the 13th section of that statute, an injured party is barred of all remedy, save by mandamus. A notice was served upon the owner of land injured by the Commissioners, stating that the latter were willing to make the plaintiff compensation for the injuries complained of, and were willing to take all steps necessary to ascertain the amount of such compensation, in case the party injured and the Commissioners should differ about the same.

*Held*, that the fact of the person injured not having replied to that notice was no answer to the charge of non-service of the notice prescribed by the 16 & 17 *Vic.*, c. 130, s. 13.

The limitations contained in the 10th section of the 18 & 19 *Vic.*, c. 110, are imported into the provisions of the 9th section of the statute; consequently, the enrolment of the final award, pursuant to the 16 & 17 *Vic.*, c. 130, is an answer now, as it would have been before the passing of the 18 & 19 *Vic.*, c. 110, to a summons and plaint which does not show that the injuries are such as compensation could be made for under a further award.

To an action for a writ of mandamus to enforce the holding of an arbitration, under the 16 & 17 *Vic.*, c. 130, it is a good plea, that the injuries complained of occurred six

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A defendant, being in custody, under execution on foot of a judgment, in consideration of his discharge, gave a bond and warrant to confess judgment for a larger amount, to a party who represented himself as the assignee of the former judgment. Judgment having been subsequently entered on foot of the bond and warrant, and registered as a mortgage against the defendant's lands, an application was, several years afterwards, made to set aside the bond and warrant, as having been obtained from the defendant by fraudulent misrepresentation and under pressure of duress.—*Held*, that on the ground that there had been some consideration for the original judgment, that a long period had elapsed, during which both the judgment creditors had left the country; and that the party in whose name the present application was made had ceased to have any personal interest in the matter;—that the motion ought not to be granted.

Where the plaintiff dictated to the defendant, in custody, a letter, addressed to an attorney whom the defendant had never seen, requiring him to attend the next day, and witness the defendant's signature to a bond and warrant of attorney—*Held*, that the fact of the attorney not having been originally named by the defendant did not vitiate the execution of the instrument by the defendant, within the 93rd General Order 1854.

*Held also*, that an attestation clause, in this form, was valid:—  
"Signed, sealed, and delivered, in the presence of Francis Carolan, attorney for the said T. G., 11



Talbot-street, Dublin, and subscribe my name as his attorney, and at his request." C. P. *Nolan v. Gumley*

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## DUTY.

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## EJECTMENT ON TITLE.

See INFANT, 2.

1. Notice to quit had been served on the defendant, in an ejectment, signed by A B, described therein as testamentary guardian of the infant plaintiff. To prove that A B was such guardian, probate of the will under which A B was appointed, and a notice which had been served (in accordance with the provisions of the 68th section of the 20 & 21 Vic., c. 79), were tendered in evidence.

*Held*, that the probate of the will was not receivable in evidence, to prove the appointment of testamentary guardians; such appointment not being a devise or other testamentary disposition of, or affecting, real estate, within the 68th section of the 20 and 21 Vic., c. 79.

*Held also*, that a notice, under the above section, need not state the purpose for which the evidence is required. C. P. *Cope v. Mooney*

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2. A deed of assignment of the premises, demised by a lease dated the 20th of October 1824, for a term of 500 years, contained a covenant on the part of the assignee to expend £2000 in building houses, within seven years, from the 1st of September 1855. The deed contained a clause of re-entry for breach of the covenant. By a subsequent indorsement, under seal, dated the 12th of November 1856, after reciting that the assignee had built one house, and was desirous to let the remainder of the premises for building ground, the following covenant was entered into on the part of the assignor:—"That

## EJECTMENT.

in case any penalty or forfeiture shall be incurred under and pursuant to, and for nonperformance of the clauses, covenants, and agreements in the deed reserved, that, in such case, such penalty or forfeiture shall not, in any manner, affect the interest of the persons who may be tenants to said within premises, so as in any manner to deprive such persons of the full benefit of their respective holdings;" and that in case such forfeiture were incurred by the assignee, "that then and in such case, such penalty or forfeiture shall not, in any manner whatsoever, interfere with or affect the interest or property of the persons who might be tenants to said demised premises under the said assignees, &c., so as in any manner to deprive them of the full benefit and advantage of their respective holdings upon the premises; and that in case of any such penalty being incurred, and that any proceedings were taken and rendered effectual on account thereof, the assignor, instead of the assignee, should be entitled to recover and receive the rents to be payable by such persons so becoming tenants to said premises; and that such persons should not be rendered liable to pay any greater sum than the rent originally reserved." The assignee having failed to perform the covenant within the specified period, the assignor brought an ejectment on the title, for breach of the covenant.

*Held*—That notwithstanding that the deed of assignment transferred to the assignee the whole of the interest of the grantor, he might re-enter for condition broken.

*Held also*—That the indorsement did not amount to a release of the condition in the principal deed, but merely to a covenant not to disturb the under-tenants.

*Held also*—That the fact that a receiver had been appointed, and acted over a portion of the premises, on foot of a judgment, registered as a

## ENDORSEMENT, &c.

mortgage, obtained by the assignor against the assignee for arrears of rent, did not amount to an eviction, so as to prevent the assignor from taking advantage of the breach of condition; and that the receipt by the receiver, from an under-tenant, of rent, which accrued due after bringing the ejectment, did not operate as a waiver of the forfeiture. C. P. *Colville v. Hall* 265

## ENDORSEMENT ON FIERI FACIAS.

See FIERI FACIAS.

## EQUITABLE REPLICATION.

See DEMURRER, 2.

## ESTOPPEL.

See DEMURRER, 2.  
INFANT, 2.

## EVICTION.

See EJECTMENT ON TITLE, 2.  
REPLEVIN.

## EVIDENCE.

See EJECTMENT ON TITLE, 1.  
HUSBAND AND WIFE.

Where, in an action against the acceptor of a bill of exchange, purporting to be accepted "*Per pro.* the Tipperary Joint-stock Bank, W. K. manager," upon the issue raised upon a traverse of the acceptance, W. K., being called as a witness, was asked, on the part of the plaintiff, whether it was part of his business, as manager, to accept bills of exchange for the said Bank? which was objected to by the defendant—*Held*, that the question was admissible.

An entry, contained in a book belonging to the Bank, purporting to be a copy of a circular informing the customers of the Bank that W. K. had been appointed manager, and had been empowered to sign all documents and indorse all bills on account of the

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## EVIDENCE.

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Bank, was admitted at the time as secondary evidence, on the part of the plaintiff, of the issuing of the original circular.—*Held*, that in the absence of evidence of the sending of the original to the customers of the Bank, that the evidence was inadmissible.

The defendant's Counsel proposed to ask the manager of another Bank whether the bill of exchange sued on was one which, in the ordinary course of business, a Bank, according to banking usages, would accept for an inland customer?—*Held*, that the question was proper.

He also proposed to ask same witness whether a bill, accepted in the same way as the present, would, according to the course of trade and bankers, put a party upon inquiry as to the authority of an acceptance?—*Held*, that the question was proper.

He also proposed to ask the same witness whether authority to indorse was authority to accept?—*Held*, that the question was inadmissible.

The Judge having told the jury that, if they believed that K., as manager of the Bank, signed the bill by direction of J. S., and that J. S. was a director at the time, the acceptance was binding on the Bank.—*Held*, that having regard to the fact that the bill was accepted *per procuration*, and that the deed of partnership required three directors to form a Court, and empowered the Court of Directors to make regulations respecting the accepting of bills, that the direction was wrong.

The fact of the knowledge, by the solicitor of a *bona fide* holder, but who has not acted for him in the particular matter, that a bill had been fraudulently accepted, is not evidence that the holder had notice of the fraud at the time of the indorsement. C. P. *Eyre v. M'Dowell* 314

2. In an action for the disturbance of the plaintiff, in his office of weigh-master of the town of C., which was

neither a county of a city nor a borough, evidence that, so far back as legal memory extended, there was a monopoly of weighing for the market of C., at certain charges, for which there was no legal warrant or explanation, but prescription, and that such monopoly had been claimed and exercised by the lord of the manor, or persons claiming under him, was *held* admissible, for the purpose of showing that C. was a market town, in which the office of weighmaster, under the 4th *Anne*, c. 14 (*Ir.*), legally existed under the appointment of the person to whom the tolls and customs belonged.

The office of weighmaster, under the statute of *Anne*, being a freehold office, and for the non-appointment of a person to fill which the lord of the manor would have been liable to penalties, proof of a party having acted as such weighmaster, coupled with the fact of his having paid a cranage rent to the lord of the manor, is evidence to go to the jury of his having been legally appointed.

*Held also*, that a proof of negative search, instituted for the purpose of showing that a party had not taken the Roman Catholic oath required by the 10 *G.* 4, c. 5, s. 10, which search did not exhaust the depositories specified in 20th section, was not sufficient to rebut the inference of law, that, in the absence of proof to the contrary, the party had duly qualified; and, that had such a search been exhaustive, that it would not have altered the case, because the party was not responsible for the non-recording of the oath.

Where a former verdict, and judgment founded thereon, established the fact of a tenancy from year to year having subsisted in 1851, the legal presumption of its continuance is not rebutted by evidence of a forcible possession having been subsequently taken by the landlord. *C. P. M'Mahon v. Ellis*

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## FIERI FACIAS.

## EXCEPTIONS.

*See* HUSBAND AND WIFE.

## EXECUTION.

*See* FIERI FACIAS.

INTERPLEADER ORDER.

## EXTINGUISHMENT.

*See* WAY, RIGHT OF.

## FEE-FARM GRANT.

To a summons and plaint, by an assignee of the original grantor of a fee-farm grant, against a defendant, as assignee of the original grantee, for a breach of covenant, committed prior to the 1st of January 1861, the defendant demurred.—*Held*, that fee-farm grants come within the scope of the Landlord and Tenant Law Amendment Act (Ireland) 1860 (23 and 25 *Vic.*, c. 154). And (*Pigot, C. B., dissentiente*) that fee-farm grants, executed prior to the passing of that statute, are affected by its provisions.

*Per* *Pigot, C. B.*—That without expressing any opinion as to whether fee-farm grants come within the scope of the statute, the latter does not contain sufficiently clear and unequivocal indications of the intentions of the Legislature that it should have a retrospective operation. *E. Chute v. Busted* 115

## FENCES, MAINTENANCE OF.

*See* NEGLIGENCE, ACTION FOR, 1.

## FIERI FACIAS.

*See* INTERPLEADER ORDER.

SHERIFF'S EXPENSES, &c.

A Sheriff seized the goods of E. S., under a *fi. fa.*, delivered to him by L., to whom A. S. was indebted. The writ contained the following indorsement, made by L.:—"The defendant is a widow lady, and resides at No. 15 Mespil-parade, in the county Dublin, where she has goods and chattels."

## FISHING, &c.

*Held*, that L. was made liable, as a trespasser to E. S., by the above indorsement. *E. Stratten v. Lawless*  
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## FISHING, CLAIM OF RIGHT TO.

*See* DEMURRER, 3.

## FORFEITURE.

*See* EJECTMENT ON TITLE, 2.

## FRAUD.

*See* DURESS.

## GENERAL ORDER.

*See* DURESS.

The 178th General Order applies to cases of trial by proviso. *Q. B. Gardiner v. Gardiner* *App.* xxxi

## GRAND JURY PRESENTMENTS.

*See* CERTIORARI.

## GRANT.

*See* FEE-FARM GRANT.

## GUARDIAN.

*See* EJECTMENT ON TITLE, 1.

## HUSBAND AND WIFE.

In an action for necessities provided by the plaintiff for the defendant's wife, the substantial question was as to the fact of a marriage having taken place between the defendant and his alleged wife. The plaintiff gave evidence for the purpose of showing that, according to the law of Scotland, a valid, though irregular marriage had been celebrated. Professional witnesses called at either side gave conflicting evidence respecting the state of the marriage law of Scotland as bearing upon the facts of the case.

*Held*, that the Judge was right in leaving it entirely to the jury, as a question of fact, to say whether the alleged Scotch marriage was a valid contract in accordance with the law

## HUSBAND AND WIFE. 579

of that country, and that he was not bound to have directed them as to what was the state of the law of Scotland with reference to the facts in evidence.

Evidence was further given of a marriage having been subsequently celebrated in Ireland between the parties, by a Roman Catholic priest in holy orders, according to the rites of that Church. It was proved on the part of the plaintiff that the defendant had, within twelve months, occasionally attended Roman Catholic worship, that he had expressed himself in private conversations in approval of the doctrines of the Church of Rome, and that he had declared himself to be of that persuasion to the officiating clergyman. In was on the other hand proved, on the part of the defendant, that he had been born and educated in the doctrines of the Church of England; that he had never publicly renounced that profession, and that he had attended the Episcopal Service frequently during the twelve months next before the ceremony.

*Held, per* MONAHAN, C. J., and BALL, J., that there was evidence from which a jury might infer that the defendant had been a Roman Catholic throughout the entire period of twelve months before the marriage, so as to take the case out of the operation of the 19 G. 2, c. 13 (*Ir.*); the latter statute having reference to actual religious belief, and not merely nominal profession.

*Held contra, per* KEOGH and CHRISTIAN, JJ., that notwithstanding the evidence relied on by the plaintiff, the learned Judge was bound to tell the jury that the defendant had not ceased during the period in question to profess the Protestant religion within the meaning of the statute, and that the marriage was void in law.

*Quære*, as to the practice of inserting in the bill of exceptions the

findings of the jury upon collateral questions left to them by the Judge.  
*C. P. Thelwall v. Yelverton* 188

## INFANT.

*See* EJECTMENT ON TITLE.

1. A lease made by an infant is not void, but voidable only, notwithstanding that the rent reserved is not the best obtainable. A lease made by an infant, so reserving a rent, is not avoided by a lease of the same lands, made to a third party by the infant upon his attaining his full age. To avoid a lease made by an infant, under which the lessee is in possession, upon the lessor attaining twenty-one years of age, some act of notoriety, viz., ejectment, entry, or demand of possession, is requisite. Mere execution of a second lease by the lessor will not devast the estate created by the first lease.

Both leases might stand together, as a lease and a grant of the reversion therein.

Two tests, as to what acts of an infant are void, and what voidable.  
*E. Slator v. Brady* 61

2. A, while an infant, made a lease to B, of certain lands, reserving a rent; and during his minority commenced an action of ejectment, by C his next friend, against B, laying the demise on the 23rd of January 1861. A attained full age on the 27th of April 1861; and on the 29th of April, in the same year, executed to C a lease of all his estate of W. (including the lands demised to B), and that lease contained a covenant to avoid all the leases on the W. estate, made by him during his minority.

A, on the 14th of June 1861, received from B the half-yearly gale of rent due on the 1st of May 1861, in respect of the lands demised to him, and on the same day gave a receipt to B for that gale of rent, and executed a confirmation of B's lease. No step had been taken in the eject-

## INTERPLEADER ORDER.

ment proceedings from the time when A came of age until the execution of the confirmation. The ejectment having been afterwards proceeded with, and a verdict had for the plaintiff, on motion that that verdict should be set aside, and a verdict entered for the defendant—

*Held*, that as A was estopped by his receipt of rent from disputing B's title for the period between the 1st of November 1860 and the 1st of May 1861, he could not maintain an action of ejectment against B, in which the demise was laid on a day within that period.

*Held also*, that, by the execution of the confirmation, A was precluded from relying on the lease to C, either as an avoidance of the lease to B or for the purpose of showing that, at the date of the confirmation, he had no estate sufficient to enable him to confirm that lease.

*Held also*, that the confirmation, although made subsequently to the commencement of the action, related back so as to set up the lease to B from the day of its execution.

*Held also*, that the 204th section of the Common Law Procedure Act 1853 does not apply to a case where the plaintiff takes title out of himself.

*Held per* O'BRIEN and HAYES, JJ., that where an infant makes a lease, reserving a rent, he cannot avoid it until of full age.

The case of *Thornton v. Illingworth* observed on. *Q. B. Slator Trimble* 343

## INTERPLEADER ORDER.

*See* SHERIFF'S EXPENSES.

A Sheriff having seized goods under a *fi. fa.*, a claim was lodged by the holder of a bill of sale. The interpleader order directed the goods to be sold, and their produce to be lodged in Court, pending the trial of the issue. The jury found that all the

## INTERROGATORIES.

goods seized were included in the bill of sale held by the plaintiff, save goods of the value of £23.—*Held*, that the plaintiff in the interpleader issue was entitled to the costs of the interpleader order and issue, and also to draw the amount produced by the goods covered by his bill of sale, free of Sheriff's poundage; that the plaintiff and the defendant in the issue should pay the Sheriff the expenses of the sale in the proportion to the sums to which they were entitled—the Sheriff to have his poundage only upon the sum to which the execution creditor was found to be entitled. *E. Vanston v. Symes* *App. iii*

## INTERROGATORIES.

Common Law Procedure Act 1854, ss. 56 and 57. Form, and extent of, interrogatories which may be exhibited to an executor upon plea of *plene administravit*. Such motions must be upon notice. *E. Peck v. Nolan* *App. xxxii*

## ISSUE, DISCHARGE OF JURY FROM FINDING.

*See* DOWN SURVEY.  
INTERPLEADER ORDER.

## JUDGMENT MORTGAGE.

*See* DURESS.  
EJECTMENT ON TITLE, 2.

## JUDICIAL DISCRETION.

*See* CERTIORARI.  
MANDAMUS.

## LANDLORD AND TENANT LAW AMENDMENT ACT 1860.

*See* FEE-FARM GRANT.  
REPLEVIN.

## LEASE.

*See* AGREEMENT.  
DETINUE, ACTION OF.  
INFANT, 1, 2.

## LIBEL.

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## LEGACY DUTY.

The exemption from legacy duty of "any legacy given for any purpose merely charitable," contained in the 5 & 6 Vic., c. 82, s. 38, applies only where the charitable purpose for which the legacy is given is described by and in the will. Therefore, when a testatrix bequeathed the residue of her real and personal property to A and B, and the survivor of them, his heirs, executors, administrators and assigns, and requested that the intentions expressed in her will might be carried into effect, without stating in the will what those intentions were, but, contemporaneously with the execution of the will, sent a letter to A and B, stating that she had made the bequest to them in the full confidence that they would found a convent for the education of poor female children—*Held*, that the personal representative of A and B was liable to legacy duty upon the amount of the residue bequeathed. *E. Attorney-General v. Cullen* 137

## LIBEL.

*See* MANDAMUS.

1. Action for a libel contained in a letter addressed by the defendant to an attorney, who had been employed by the plaintiff to sue a third party for a sum of money alleged to be due to him, and the purport of which letter was, to dissuade the attorney from proceeding with the suit. The letter went on to charge the plaintiff's wife with having created a turmoil in her neighbourhood. The defendant pleaded that the plaintiffs were the tenants of a party to whom the defendant was land-agent, and A was bailiff of the estate; that in pursuance of an agreement between the parties, and by the direction of the defendant, A had sold the interest of the plaintiffs in their holdings; which sum A afterwards duly applied in pursuance of the terms of the agreement; but which application the

## LIBEL.

plaintiffs had refused to ratify, and employed the attorney to sue A for the amount; and that under the circumstances, as aforesaid, the defendant did write and publish the said letter, believing the matters therein stated to be true, and to protect his said servant, the said A, from vexatious litigation, as he lawfully might, for the causes aforesaid.

*Held*, that this was a good plea of privileged communication; and that, notwithstanding the absence of an averment that the publication was *bona fide* and without malice, it sufficiently appeared that the writing of the letter was written exclusively for the purpose mentioned in the latter clause of the defence, which excluded the inference of malice.

*Held also*, that if the defence showed that the privilege had been exceeded, the alleged excess was a matter only for the jury to consider on the question of malice, and did not vitiate the defence. C. P. *Hal-loran v. Thompson* 335

2. In an action for libel, the defendant pleaded that the letter containing the libel was intended to come into the hands of the plaintiff himself, but, by mistake, was directed by the defendant, and delivered through the Post-office, to the plaintiff's employer, instead of to the plaintiff.

*Held*, on demurrer, that the above plea was bad, as the letter was not a privileged communication; and as the legal inference of malice would have arisen, even though the letter had been addressed and delivered to the plaintiff; and that the absence of intention to give the plaintiff a remedy by civil action for the malicious act (to which the plea amounted) was no defence. E. *Fox v. Broderick* 453

## LICENSE.

*See* NEGLIGENCE, ACTION FOR, 2.  
PUBLICAN'S LICENSE.

## MISREPRESENTATION.

## MALICE.

*See* LIBEL, 1, 2.

## MANDAMUS.

*See* DEMURRER, 3.

## DRAINAGE ACTS.

The Court of Queen's Bench will not grant even a conditional order for a writ of *mandamus* commanding a Court of Quarter Sessions, which has already exercised soundly its judicial discretion in the matter, to send up to the Grand Jury a bill of indictment for the publication of a malicious libel, instead of postponing it to the next Assizes. Q. B. *In re W. Armstrong* 97

## MARRIAGE.

*See* HUSBAND AND WIFE.

## MARRIAGE, BREACH OF PROMISE OF.

To an action for breach of a promise to marry, a defence, alleging "that before and at the time of the making of the agreement," &c. &c., "the plaintiff was a woman of unchaste and immoral behaviour, and of incorrect and immoral habits and conduct, and of bad conduct and reputation," is bad, for vagueness, and for omitting to disclose the names of the persons with whom the defendant alleges that the plaintiff has been guilty of immorality. E. *Gibbons v. Cusack* 285

## MARRIED WOMAN.

*See* HUSBAND AND WIFE.

## MEASURES.

*See* WEIGHTS AND MEASURES (Ir) AMENDMENT ACT, 1862.

## MISREPRESENTATION.

*See* DURESS.

## MILITARY BAGGAGE, &c.

### MILITARY BAGGAGE, CONVEY- ANCE OF BY RAILWAY.

"Public baggage, stores, arms," &c. &c., sent by Railway, in charge of any of her Majesty's forces specified in the 7 & 8 Vic., c. 85, s. 12, is "their baggage," no matter what may be the disproportion between the amount of baggage and the number of the force in charge of it, and must be carried by the Railway Company at the rates imposed by that section. *E. Attorney-General v. Great S. and W. Railway Co.* 447

### MISDIRECTION.

*See REFLEVIN.*

### MONEY HAD AND RECEIVED, ACTION FOR.

To sustain an action for money had and received, against a person named as a director of a projected Company, by a proposed subscriber, for his deposit, two things must be shown; first, that the money so paid came to the defendant's hand or power for the purpose of being applied to the objects of the projected Company; and, secondly, that the project failed, by reason of no Company, or no Company conformable to the prospectus having been formed.

To a summons and plaint, which averred that the defendant represented himself to be a director, and required payment of a deposit by any applicant for shares, to be made to persons named by him as the bankers of the Company, and that the plaintiff, in reliance on the representation so made by the defendant, paid to the bankers of the Company, who were his agents in that behalf, the amount of the deposit, the defendant demurred, as it was not shown that the money came to the defendant's hands. Demurrer disallowed.

The natural meaning of the averment, "That the scheme detailed in the prospectus wholly failed, and

## NEGLIGENCE. &c. 583

became abortive, and had been totally abandoned," is, that the consideration upon which the deposit was paid had wholly failed. *E. Hayes v. Stirling* 277

### NEGLIGENCE, ACTION FOR.

1. To an action brought against a Railway Company for negligence in maintaining fences, by reason whereof the plaintiff's cattle were injured, the Company pleaded that they had constructed their works in conformity with the award of the public arbitrator, appointed in pursuance of the provisions of the Railways Act (Ireland) 1851; and had since maintained same accordingly.—*Held*, that the plaintiff ought to have objected at the time to said award, if dissatisfied therewith, and could not complain of the want of accommodation works not provided for thereby.

*Held also*, that a general averment in the defence, of the authority of the arbitrator, was sufficient, within the 67th section of the Common Law Procedure Amendment Act 1853.—*C. P. Lockhart v. Irish N. W. Railway Co.* 385

2. In an action under Lord Campbell's Act, by the administratrix of P. S., the summons and plaint alleged—"That before, &c., &c., the defendants were in possession of a certain distillery, and lofts and stores connected therewith, and that the said P. S. deceased was employed by the defendants as a labourer, to do certain work in and about the said distillery, at night; and the plaintiff avers that, at the time aforesaid, the said P. S. deceased, as such labourer had, whilst so employed, access, by the license of the defendants, to one of the said lofts, at night; and, by such license as aforesaid, used one of the said lofts for the purpose of sleeping, during the intervals of the night when he was not actually engaged in his said employment; yet the defendants, well knowing the premises, wrongfully and



negligently permitted a certain aperture, then in the floor of the said loft, to remain open without being properly guarded and lighted, by reason whereof the said P. S., whilst passing in the night along the floor of the said loft, in pursuance of the said license, fell through the said aperture, and was thereby wounded and injured; and by reason of the wounds and injuries thereby occasioned to him as aforesaid, the said P. S., afterwards, within twelve calendar months, died."

*Held* on demurrer, that the summons and plaint disclosed neither a contract nor a duty binding on the defendants to guard or light the aperture in question.

A mere license, given by the owner, to enter and use premises, for which the licensee has full opportunity, which contain no concealed cause of mischief, and in which any existing source of danger is apparent, throws no obligation upon the owner to guard the licensee against danger. *E. Sullivan v. Waters* 460

#### NEW TRIAL.

*See* DOWN SURVEY.

#### NONSUIT, RESERVATION OF LEAVE TO ENTER.

*See* REPLEVIN.

#### NOTICE TO QUIT.

*See* EJECTMENT ON TITLE, 1.

#### NOTICE OF TRIAL.

*See* GENERAL ORDER.

#### ORDER, 93RD GENERAL.

*See* DURESS.  
GENERAL ORDER.

#### ORDNANCE SURVEY.

*See* DOWN SURVEY.

#### PEACE, CLERK OF.

*See* PUBLICAN'S LICENSE.

#### PROVISO.

##### PIRATING.

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DEMURRER, 1, 2, 3.

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#### PLENE ADMINISTRATIVIT.

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#### POUNDAGE, SHERIFF'S.

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#### PRACTICE.

*See* COSTS, SECURITY FOR.  
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#### PRESCRIPTION.

*See* WAY, RIGHT OF.

#### PRESENTMENTS.

*See* CERTIORARI.

#### PRESUMPTION.

*See* EVIDENCE, 2.

#### PRIVILEGED COMMUNICATION

*See* LIBEL, 1, 2.

#### PROVISO, TRIAL BY.

*See* GENERAL ORDER.

## PROMISE TO MARRY.

### PROMISE TO MARRY, BREACH OF.

*See* MARRIAGE, BREACH OF PROMISE OF.

### PUBLICAN'S LICENSE.

Clerks of the Peace are entitled to a fee of 2s. 6d. upon every renewal of a publican's license—3 & 4 W. 4, c. 68, ss. 2, 6, 10.

*M'Loughlin, appellant, the Clerk of the Peace of the county Wexford, respondent* (2 Ir. Jur. p. 168), overruled. *E. Hawkins v. M'Loughlin* App. 1

### PUBLICATION.

*See* LIBEL, 2.

### QUARTER SESSIONS.

*See* MANDAMUS.

### RAILWAY COMPANY.

*See* MILITARY BAGGAGE.  
NEGLIGENCE, ACTION OF, 1, 2.

### RECEIVER.

*See* EJECTMENT ON TITLE, 2.

### RECITAL.

*See* COVENANT, CONSTRUCTION OF.

### RE-ENTRY.

*See* EJECTMENT ON TITLE, 2.

### RELEASE.

*See* EJECTMENT ON THE TITLE, 2.

### REMOTENESS.

*See* DAMAGES.

### RENT, APPORTIONMENT OF.

*See* REPLEVIN.

### REPLEVIN.

To an avowry in an action of replevin of distress for rent, the plaintiff replied, in effect, that he was prevented from obtaining possession of the lands demised, because that, prior to said demise to him, a portion of the lands

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was, and still continues, in possession of certain persons, who derived as tenants in fee, under the defendants. Upon the evidence at the trial, it was not clear whether the parties so in possession derived under the defendants or by title paramount. The learned Judge told the jury that it was, in his opinion, immaterial to the issue, whether they derived under or independently of the defendants; and that the substance of the issue was, whether the plaintiff had got the entire quantity of the land demised.—*Held*, a misdirection, and that whether material or not, the jury were bound to find in the terms of the issue.

*Held also*, that notwithstanding that leave had been reserved to enter a nonsuit in case the Court should be of opinion that the plaintiff had failed to prove the replication in terms, that a new trial should be directed, inasmuch as the Court would have the power of amending the replication, so as to raise the substantial question at issue between the parties. *C. P. Tyrrell v. Irish Society* 493

### REPLICATION.

*See* DEMURRER, 2.

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### RESIDENCE WITHIN JURISDICTION.

*See* COSTS, SECURITY FOR.

### RIGHT OF WAY.

*See* WAY, RIGHT OF.

### ROMAN CATHOLIC OATH.

*See* EVIDENCE, 2.

### RULE TO PROCEED.

*See* TRIAL, EXTENSION OF TIME FOR.

### SALE, BILL OF.

*See* INTERPLEADER ORDER.

### SCOTCH MARRIAGE.

*See* HUSBAND AND WIFE.

## 586 SECONDARY EVIDENCE.

### SECONDARY EVIDENCE.

*See EVIDENCE, 1.*

### SECURITY FOR COSTS.

*See COSTS, SECURITY FOR.*

### SERVICE, SUBSTITUTION OF.

1. *After* a Company had ceased to exist, a member of it instituted against it an action. The Court refused to substitute service of the summons and plaint on two gentlemen, one of whom had been the attorney and a director of the Company, and the other of whom had been its secretary. Q. B. *Fayle v. Kingstown Waterworks Co.* App. x

2. The 34th section of the Common Law Procedure Amendment Act (*Ir.*) 1853, does not apply to actions of ejectment; but, under section 197, the Court has power to substitute service of an order on any party who has been properly made a defendant in an action of ejectment, and to direct the mode of service which may be most effectual. Q. B. *Poole v. Griffith* App. xx

### SHAM DEFENCE.

Where a defendant pleads a single defence, traversing a material fact in the plaint, the Court will not try its truth or falsehood on affidavit. Q. B. *O'Brien v. Tagaret* App. v

### SHERIFF'S EXPENSES AND POUNDAGE.

*See INTERPLEADER ORDER.*

The Sheriff is entitled to get from the plaintiff, who succeeds, as claimant, in an interpleader issue, the expenses of keeping live stock, seized under a *f. fa.*, of which the plaintiff might, upon giving security to the Sheriff, have obtained possession. Q. B. *Taaffe v. Tyrrell* App. xxvii

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### SURVEY.

*See DOWN SURVEY.*

### TAXATION OF COSTS.

*See COSTS.*

### TENANCY IN COMMON.

*See DOWN SURVEY.*

### TENANCY FROM YEAR TO YEAR.

*See AGREEMENT.*

### TESTAMENTARY GUARDIAN.

*See EJECTMENT ON TITLE, 1.*

### TITLE.

*See COVENANT, CONSTRUCTION OF.*

### TOWNLAND.

*See DOWN SURVEY.*

### TRESPASS, ACTION OF.

*See DOWN SURVEY.*

*FERI FACIAS.*

### TRIAL, EXTENSION OF TIME FOR, NOTWITHSTANDING ENTRY OF RULE TO PROCEED.

The 106th section of the Common Law Procedure Act 1853, does not preclude the Court from looking at the

## TRIAL BY PROVISO.

circumstances under which a plaintiff withdrew the record at the Assizes, indicated by the first rule mentioned in that section.—[HUGHES, B., *dis-sentiente*].

Circumstances under which extension of time was granted to a plaintiff.  
E. *Colclough v. Colclough* 523

## TRIAL BY PROVISO.

See GENERAL ORDER.

## USES, STATUTE OF.

See DETINUE, ACTION OF.

## WAIVER.

See EJECTMENT ON TITLE, 2.

## WARRANT TO CONFESS JUDGMENT.

See DURESS.

## WAY, RIGHT OF.

A lease, dated June 1848, and made in pursuance of an agreement of 1802, demised certain premises, "with the rights, members, and *appurtenances* thereunto belonging, or in anywise appertaining."

Evidence was given of the enjoyment of a right of way, by the occupiers of the demised premises, over the premises of the lessor, under whom the defendants claimed, for more than forty years before action brought; and that the right of way in question was essential to the enjoyment of the demised premises.

*Held*, that there was no unity of

## YEARLY TENANCY. 587

possession of the dominant and servient tenements in the lessor, upon the grant of the lease of 1848, sufficient to extinguish the right of way.

*Held also*, that the right of way, being essential to the beneficial enjoyment of the demised premises, passed under the word *appurtenances*.  
Q. B. *Kavanagh v. The Coal Mining Co.* 82

## WEIGHMASTER.

See EVIDENCE, 2.

## WEIGHTS AND MEASURES (*Ir.*), AMENDMENT ACT 1862.

The deductions prohibited in the 13th section of the 25 & 26 *Vic.*, c. 76 (the Weights and Measures (Ireland) Amendment Act 1862), are deductions from the *weight*, not the *price* of any article sold by weight. E. *Megarry, appellant; M'Cullagh, respondent* 151

## WITHDRAWING RECORD AT ASSIZES.

See TRIAL, EXTENSION OF TIME  
FOR.

## WITNESS TO BILL OF SALE, DESCRIPTION OF.

See BILL OF SALE.

## WILL.

See LEGACY DUTY.

## YEARLY TENANCY.

See AGREEMENT.





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